

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

4 SIAVASH L. MOJARRAD, - Docket No. 5:20-cv-396-FL
5 as administrator of The -
Estate of Soheil Antonio-
Mojarrad, -
6 -
7 Plaintiff, - New Bern, North Carolina
8 v. - February 6, 2023
9 - Final Pretrial Conference
10 WILLIAM BRETT EDWARDS, -
in his individual -
capacity, -
11 -
Defendant. -

12 TRANSCRIPT OF FINAL PRETRIAL CONFERENCE
13 BEFORE THE HONORABLE LOUISE WOOD FLANAGAN
 UNITED STATES DISTRICT JUDGE.

14 APPEARANCES:

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25 Proceedings recorded by mechanical stenography,
transcript produced by notereading.

1 (Commenced at 11:10 a.m.)

2 THE COURT: Good morning.

00:00:02 3 MS. EDWARDS: Good morning Your Honor.

00:00:04 4 THE COURT: For the record, how does one
00:00:06 5 pronounce the plaintiff?

00:00:09 6 MS. EDWARDS: The plaintiff is Siavash
00:00:15 7 Mojarrad, and the decedent is Soheil Mojarrad.

00:00:19 8 THE COURT: So during trial you're wanting
00:00:21 9 to refer to the decedent just directly as Soheil?

00:00:26 10 MS. EDWARDS: Yes, Your Honor. We thought
00:00:28 11 with the plaintiff being Siavash Mojarrad and the
00:00:31 12 decedent being Soheil Mojarrad, that that would be
00:00:35 13 easier than "Mr. Mojarrad."

00:00:38 14 THE COURT: Any objection as to that
00:00:40 15 nomenclature?

00:00:42 16 MR. HARTZOG: No objection.

00:00:43 17 THE COURT: It makes sense to me.

00:00:48 18 So for the plaintiff, counsel, if you would
00:00:52 19 please introduce those who are in attendance with you.

00:00:57 20 MS. EDWARDS: Catharine Edwards for the
00:00:59 21 plaintiff. I'm with Kristen Beightol also for the
00:01:02 22 plaintiff, and our paralegal Chelsea Clemons.

00:01:05 23 THE COURT: And for the Defendant?

00:01:05 24 MR. HARTZOG: Good morning, Your Honor. Dan
00:01:07 25 Hartzog, Jr. for Officer Edwards. I'm here with Rachel

00:01:13 1 Posey, who has not entered and an appearance in the case
00:01:17 2 yet because she will be doing her E filing training on
00:01:20 3 Wednesday.

00:01:21 4 THE COURT: Now, I'm not correcting you; in
00:01:23 5 fact, I'm going to give you dispensation. But now that
00:01:25 6 we're not wearing masks, the protocol in the Eastern
00:01:28 7 District is that counsel would rise when addressing the
00:01:31 8 judge. And so I'm confident that you will remember
00:01:34 9 that going forward.

00:01:35 10 However, today I'm going to invite you to
00:01:38 11 stay seated because I expect we're going to be going
00:01:41 12 back and forth fairly quickly, and that might actually
00:01:44 13 improve efficiencies. This is somewhat of a dialogue
00:01:48 14 preparing a civil matter for trial. As I told you the
00:01:53 15 other day on the phone, the Court's goal is that each
00:01:56 16 side be the best that it can be and the case get to the
00:01:59 17 jury as efficiently as possible.

00:02:02 18 So I assume the journey this morning with
00:02:06 19 Mr. Willett was a successful experience. Anybody
00:02:09 20 having any issues with technology?

00:02:11 21 Okay. Good.

00:02:13 22 So many, many things brought to my attention
00:02:21 23 in this case for address. Why don't we start with
00:02:28 24 defendant's motion to redesignate Meghan Clement as a
00:02:36 25 case in chief expert witness. And this is really

00:02:42 1 paired with plaintiff's motion, as the Court understands
00:02:44 2 it, to exclude expert testimony in the field of forensic
00:02:48 3 biology and forensic DNA. And we've also got this
00:02:54 4 other individual whose name is a little difficult to
00:02:58 5 pronounce that kind of pairs up with Clement. So why
00:03:09 6 do you think you should be able to bring -- and give me
00:03:14 7 the name of that second person. What's her name?
00:03:17 8 MR. HARTZOG: Yes, Your Honor. Give me one
00:03:19 9 second. It is --
00:03:22 10 MS. POSEY: It's Bracamontes, Your Honor.
00:03:25 11 THE COURT: Why do you need Bracamontes all
00:03:28 12 of a sudden, which is somebody we've really not heard
00:03:32 13 too much about at all?
00:03:33 14 MR. HARTZOG: Well, Your Honor, we did
00:03:34 15 disclose in our supplemental pretrial disclosures back
00:03:39 16 in -- I believe it was March of 2022 that we intended to
00:03:45 17 call an authenticating witness for that information from
00:03:49 18 Cybergeneitics. We didn't know the name of the
00:03:52 19 individual we were going to call, but we identified an
00:03:54 20 authenticating witness to authenticate that report.
00:03:57 21 Jennifer Bracamontes is the one we have identified to be
00:04:00 22 that witness. So plaintiff's counsel has been aware
00:04:04 23 that we're going to call an authenticating witness since
00:04:08 24 March of 2022. And We supplemented our initial
00:04:12 25 disclosures to make that clear.

00:04:16 1 THE COURT: Why do you think at this point
00:04:18 2 in time you should be able to redesignate Meghan Clement
00:04:26 3 when the plaintiff has withdrawn Foran?

00:04:32 4 MR. HARTZOG: Well, Your Honor, so when we
00:04:33 5 originally designated expert witnesses, we were not
00:04:37 6 aware that any DNA evidence would be tested in this
00:04:39 7 case. It was not until plaintiff's counsel approached
00:04:42 8 us and said that they were intending to have Officer
00:04:49 9 Edwards's DNA tested, and if we didn't consent, they
00:04:53 10 were going to be filing a motion.

00:04:54 11 Officer Edwards said: I'd be happy to give
00:04:57 12 my DNA. And so we consented to the collection of his
00:05:00 13 DNA.

00:05:01 14 That was in December of '21, which is after
00:05:04 15 we had already disclosed our expert witnesses. And so
00:05:09 16 by necessity we designated her as a rebuttal expert
00:05:12 17 because our disclosure deadline had already passed.
00:05:17 18 But it was because this concept of testing Officer
00:05:22 19 Edwards's DNA had not come up until December of 2021.
00:05:27 20 So we designated Meghan Clement as our rebuttal expert
00:05:32 21 in December of '21, provided a report, and then provided
00:05:35 22 a supplemental report in March of 2022. And in that
00:05:38 23 report she laid out all her opinions in the case.

00:05:42 24 And plaintiff's counsel indicated that if
00:05:45 25 her opinions were what was in the report, they didn't

00:05:48 1 feel the need to depose her.

00:05:50 2 It wasn't until later on that we realized
00:05:53 3 that if Dr. Foran were withdrawn, that we might have an
00:05:59 4 issue with her being a rebuttal expert. We approached
00:06:03 5 plaintiff's counsel and said: Can we reach compromise
00:06:06 6 on that, and we'll withdraw our motion on Foran if we
00:06:09 7 can move Meghan Clement up to a case in chief expert.

00:06:14 8 Plaintiff's counsel did not agree with that
00:06:16 9 proposal. And after we had proposed that is when they
00:06:19 10 withdrew Dr. Foran, I think for the purpose of excluding
00:06:24 11 Meghan Clement.

00:06:27 12 We then filed our motion to redesignate her
00:06:31 13 as soon as we were able to do that. We had some comings
00:06:34 14 and going with our firm with an associate leaving and
00:06:37 15 Ms. Posey coming in. So I agree, maybe we should have
00:06:40 16 filed that motion earlier, but we filed it as soon as we
00:06:43 17 were able. Plaintiff's counsel was aware that we were
00:06:45 18 going to be filing that motion. But the main reason,
00:06:49 19 Your Honor, is that the DNA evidence is a crucial piece
00:06:53 20 of evidence in this case. The plaintiff's theory all
00:06:55 21 along has been that Officer Edwards planted the knife on
00:07:04 22 Soheil Mojarrad -- I've been saying Soheil. I'm going
00:07:08 23 to have to correct myself. Soheil Mojarrad.

00:07:11 24 The DNA evidence, we believe, shows that
00:07:14 25 Officer Edwards never touched the knife and was the only

00:07:16 1 one with the opportunity to have planted the knife,
00:07:19 2 because the next individual on the scene was Officer
00:07:22 3 Thompson, who had his body camera on. And as he walked
00:07:26 4 up to Mr. Mojarrad, the knife was in his hand at that
00:07:30 5 time. So if the DNA evidence excludes Officer Edwards
00:07:33 6 as a contributor to that knife, and there were two other
00:07:37 7 individuals who had touched the knife whose DNA were on
00:07:41 8 the knife, I believe that is pretty compelling evidence
00:07:45 9 for the jury that Officer Edwards did not, in fact,
00:07:49 10 plant the knife.

00:07:49 11 And that's a key piece of evidence in this
00:07:51 12 case. It is, in fact, really the issue of the entire
00:07:55 13 case, is: Did Mr. Mojarrad have a knife on him at the
00:07:59 14 time? And I just think this trial should be about truth
00:08:04 15 of what happened. And fundamental fairness should
00:08:08 16 allow us to present that evidence to the jury.

00:08:11 17 If Officer Edwards didn't touch the knife,
00:08:13 18 he should be allowed to tell the jury that.

00:08:16 19 We've had Ms. Clement designated as an
00:08:20 20 expert in this case since December of '21. So this is
00:08:23 21 not someone that we've just sprung on plaintiff's
00:08:25 22 counsel at the last minute. She was on our disclosure
00:08:29 23 list; she was on our pretrial list. It wasn't until
00:08:32 24 plaintiff withdrew Dr. Foran that this became an issue.

00:08:36 25 And again, they only withdrew Dr. Foran

00:08:40 1 after we said we may redesignate Meghan Clement because
00:08:44 2 we realize that that could be an issue.

00:08:47 3 THE COURT: So when was that conversation or
00:08:51 4 dialogue?

00:08:52 5 MR. HARTZOG: That was, I believe, December
00:08:57 6 of 2022.

00:09:00 7 MS. BEIGHTOL: Your Honor, I believe the
00:09:01 8 conversation about the proposal was on November 21,
00:09:05 9 2022.

00:09:07 10 Our withdrawal of Dr. Foran was December 7,
00:09:11 11 2022.

00:09:12 12 MR. HARTZOG: That's correct, Your Honor.
00:09:13 13 Those dates are correct.

00:09:15 14 THE COURT: So when you said to me a few
00:09:17 15 minutes ago plaintiff was aware that we were going to
00:09:19 16 file that motion, you are speaking of November 21st?

00:09:25 17 MR. HARTZOG: That's correct, Your Honor.
00:09:27 18 We indicated that that was our proposal, that we were
00:09:29 19 intending to possibly redesignate Ms. Clement as a case
00:09:33 20 in chief expert because we realized the issue with Dr.
00:09:36 21 Foran, and it was after that, December 7th, that
00:09:39 22 plaintiff withdraw Dr. Foran.

00:09:41 23 THE COURT: And remind me when this motion
00:09:43 24 was filed.

00:09:44 25 MR. HARTZOG: The motion was filed in

00:09:52 1 January. And I'm trying to find the exact date.

00:09:57 2 January 20th, Your Honor.

00:10:02 3 THE COURT: Okay. Is there anybody else
00:10:08 4 reasonably that plaintiff's motion to exclude expert
00:10:15 5 testimony in the field of forensic biology and forensic
00:10:19 6 DNA might reasonably reach to on your side of the case?

00:10:25 7 MR. HARTZOG: Meghan Clement is the only one
00:10:27 8 we had designated as an expert in that field.

00:10:31 9 Jennifer Bracamontes, again, we identified
00:10:33 10 as -- not by name, but as someone from Cybergeneitics to
00:10:38 11 authenticate the report in March of 2022.

00:10:40 12 THE COURT: So there's nobody else?

00:10:43 13 There's no other expert?

00:10:44 14 MR. HARTZOG: That's correct, Your Honor.

00:10:45 15 I don't believe so.

00:10:47 16 THE COURT: All right. So why should the
00:10:52 17 Court, just without regard to late disclosures, what is
00:10:56 18 the basis for the motion to exclude?

00:11:01 19 MS. BEIGHTOL: It's actually a couple
00:11:03 20 different reasons, Your Honor. And if I may, I gave
00:11:05 21 you the date November 21 as the date that the proposal
00:11:09 22 was made. But the more important date, as my
00:11:14 23 co-counsel just referenced, is actually the date they
00:11:17 24 filed to move to exclude Dr. Foran, which was back in
00:11:20 25 April. Ms. Clement has been identified as a rebuttal

00:11:27 1 expert since December of 2021. And you just heard from
00:11:35 2 Mr. Hartzog that as far back as the beginning of the
00:11:39 3 case it's always been the theory that Mr. Edwards or
00:11:47 4 Officer Edwards had planted the knife. At that time
00:11:49 5 when they identified her as a rebuttal expert they could
00:11:52 6 have moved for her to be a case in chief, but they
00:11:55 7 didn't.

00:11:57 8 And then moving forward, up to now, each
00:12:00 9 step they've made is to not put her in place or to move
00:12:03 10 to have her case in chief. They have twice, as Your
00:12:07 11 Honor will recall, moved to exclude Dr. Foran.

00:12:11 12 And the case law is that a rebuttal expert
00:12:13 13 is a rebuttal expert. They are there to rebut evidence
00:12:17 14 from the other side. And if you look at the
00:12:19 15 designation of Ms. Clement, it actually says that her
00:12:23 16 only role is to rebut evidence of Dr. Foran. So our
00:12:28 17 basis in our motions in limine, which we did only having
00:12:32 18 the pretrial disclosures which listed Ms. Clement, which
00:12:35 19 was a surprise to us, because no motion had been made
00:12:38 20 before that time, no motion had been made since December
00:12:41 21 7, because she was effectively excluded at the time that
00:12:46 22 Dr. Foran was withdrawn.

00:12:50 23 This new motion came over a month later.
00:12:53 24 It came after pretrial disclosures. And, you know, at
00:12:58 25 this point they've mentioned that they knew all along

00:13:01 1 that this was an allegation the knife was planted.

00:13:05 2 More than that, at the very first answer of the

00:13:07 3 complaint of the original complaint in this case they

00:13:12 4 alleged that Mr. Mojarrad or Soheil had gone against

00:13:17 5 Edwards with a knife. At the very, very beginning.

00:13:21 6 So if there was an allegation with regard to the knife,

00:13:24 7 and DNA was necessary of the knife, that was known at

00:13:27 8 the outset. But certainly it was known in December when

00:13:30 9 they designated Ms. Clement.

00:13:34 10 If you look at the declaration and the

00:13:36 11 designation and her report, all of it is rebutting Dr.

00:13:42 12 Foran. All of it. It's not like the paragraphs are

00:13:45 13 talking about separate independent things. They're

00:13:47 14 going against the expert, Dr. Foran.

00:13:50 15 So they didn't identify somebody. Then

00:13:52 16 when they kept going down the road, they tried to

00:13:54 17 exclude Dr. Foran without trying to designate her in the

00:13:58 18 case in chief. And when we finally withdrew him after

00:14:01 19 declining to make an agreement to have her go in the

00:14:03 20 case in chief, it was over a month before they moved the

00:14:07 21 Court and well after pretrial disclosures for her to be

00:14:11 22 redesignated as a case in chief.

00:14:14 23 And this puts plaintiff in a very bad

00:14:16 24 position and is super prejudicial because we don't have

00:14:19 25 the opportunity to depose her. We didn't depose her in

00:14:22 1 our initial case, and the reason we didn't depose her in
00:14:25 2 our initial case is she was a rebuttal expert; she was a
00:14:28 3 very limited rebuttal expert against our expert. Now
00:14:31 4 we're put in the position of being at the pretrial
00:14:33 5 conference with her being put in the case in chief,
00:14:38 6 according to what they're asking. And if that's the
00:14:40 7 case, we're going to be forced to do a discovery
00:14:43 8 deposition at trial. We don't have the opportunity to
00:14:45 9 put an expert in the case. And, in fact, we relied on
00:14:48 10 the fact that they had moved to remove our expert in
00:14:52 11 withdrawing Dr. Foran, which would effectively withdraw
00:14:55 12 all of the DNA expert witnesses in this case. And so
00:15:01 13 if this motion is granted, then we've relied on that,
00:15:04 14 and we don't have Dr. Foran in the case.

00:15:07 15 THE COURT: And this is all within my
00:15:09 16 discretion?

00:15:11 17 MS. BEIGHTOL: Correct, Your Honor.

00:15:21 18 THE COURT: Well, I, in my discretion, am
00:15:24 19 denying the defendant's motion to redesignate Meghan
00:15:27 20 Clement as a case in chief expert witness. And I'll
00:15:31 21 enter a written order later.

00:15:38 22 MR. HARTZOG: Your Honor, may I ask one
00:15:40 23 question? Would Ms. Clement be allowed to be a
00:15:44 24 rebuttal witness for some of the other evidence that
00:15:47 25 they have in the case, namely the issue of Mr. Mojarrad

00:15:53 1 not having a knife? Because I think she does rebut
00:15:56 2 that evidence as well.

00:15:59 3 And just a little bit of background. When
00:16:02 4 we first were looking at the DNA evidence in the case,
00:16:05 5 the SBI had determined that the DNA was inconclusive.
00:16:09 6 So at the outset of the case we were not aware that
00:16:12 7 there was any additional DNA testing that could be done.
00:16:15 8 And so that's why we did not have a DNA expert at the
00:16:19 9 outset, because we weren't aware there was even this
00:16:22 10 process. So we learned that after our expert
00:16:26 11 disclosures were due.

00:16:28 12 THE COURT: So that really renews
00:16:30 13 plaintiff's motion to exclude this testimony?

00:16:34 14 MR. HARTZOG: I suppose so, Your Honor.

00:16:38 15 THE COURT: What says the plaintiff?

00:16:40 16 MS. BEIGHTOL: It's the same issue for us,
00:16:42 17 Your Honor. He found out about this DNA evidence a
00:16:45 18 long time ago. We're at the eve of trial. He actually
00:16:48 19 actively moved to exclude Dr. Foran twice, who was our
00:16:52 20 expert speaking on these issues. I mean, putting this
00:16:56 21 on us right now when this was -- I understand that we
00:17:00 22 withdrew Dr. Foran on December 7. But that was after
00:17:04 23 two motions trying to exclude him. He has actively
00:17:09 24 tried to get the DNA evidence out of this case through
00:17:11 25 our expert. And now that he has, he's asking to have

00:17:15 1 someone come in on his behalf and speak on it. And
00:17:18 2 that puts us in a very prejudicial position at this
00:17:21 3 point, especially when they knew about the DNA test long
00:17:25 4 before now, at least before December 2021 when they
00:17:29 5 designated Ms. Clement in the first place.

00:17:31 6 Again, she was not designated. The
00:17:33 7 designation for her does not say she's going to speak on
00:17:36 8 all these issues. It says specifically and explicitly
00:17:40 9 that she is going to rebut Dr. Foran.

00:17:44 10 THE COURT: Do you want to be heard further?

00:17:46 11 MR. HARTZOG: Yes, Your Honor. If you look
00:17:47 12 at Meghan Clement's report, it does not only rebut Dr.
00:17:51 13 Foran; it also provides the affirmative opinion that
00:17:55 14 Officer Edwards, based on the DNA testing, can be
00:17:57 15 excluded as a DNA contributor to the knife. That
00:18:01 16 directly rebuts testimony of other witnesses that
00:18:05 17 Officer Edwards -- that Soheil did not have a knife,
00:18:10 18 because the only way the knife could have been put in
00:18:13 19 his hand is Officer Edwards. So she provides direct
00:18:17 20 rebuttal to their witness testimony that Soheil was --

00:18:23 21 THE COURT: So what part of that report are
00:18:24 22 you specifically referring me to? Can you give me a
00:18:31 23 paragraph number?

00:18:32 24 MR. HARTZOG: Yes, Your Honor. If you look
00:18:32 25 at the supplemental reports of Meghan Clement, paragraph

00:18:36 1 13. The supplemental, because that's when the DNA
00:18:39 2 testing came back. She says, "It is my opinion that,
00:18:42 3 due to the below stochastic level DNA obtained from the
00:18:45 4 knife swabbing, as well as the peaks below the
00:18:48 5 reportable" --

00:18:50 6 THE COURT: Let's just slow down. Can you
00:18:53 7 remind me what docket number that supplemental report
00:18:57 8 is? And I would like to just take a look at it.

00:19:01 9 MR. HARTZOG: Yes, Your Honor. I'm not
00:19:04 10 familiar with the docket number, but I believe we
00:19:07 11 attached it to our motion to redesignate.

00:19:11 12 THE COURT: Okay. I popped on first report,
00:19:14 13 and every paragraph talks about Dr. Foran, basically.
00:19:20 14 So I certainly wanted to review the report that you were
00:19:23 15 making reference to that did far more than that again.
00:19:31 16 So let me just see if I have the paper in front of me.
00:19:36 17 If not, if my law clerk -- do you have that right in
00:19:39 18 front of you, Catie?

00:19:45 19 We don't seem to be able to find it quickly.
00:19:48 20 Could you help me out?

00:19:50 21 MR. HARTZOG: Yes, Your Honor. Give me one
00:19:53 22 second. I will try to find it.

00:20:02 23 MS. BEIGHTOL: Are you talking about the
00:20:04 24 designation?

00:20:05 25 MR. HARTZOG: The supplemental report.

00:20:07 1 I believe it was attached to the declaration
00:20:10 2 of Meghan Clement, which would be --
00:20:13 3 MS. BEIGHTOL: The declaration is 101-15, if
00:20:18 4 that helps. Docket 101-15.
00:20:22 5 THE COURT: 101-15?
00:20:25 6 MS. BEIGHTOL: Yes, Your Honor.
00:20:26 7 MR. HARTZOG: Specifically, Your Honor,
00:20:27 8 paragraph 17 of that supplemental report is the opinion
00:20:33 9 that we believe the jury should be allowed to hear,
00:20:37 10 which is that the assessment revealed --
00:20:39 11 THE COURT: Let's just take a pause and let
00:20:42 12 me look at this for a moment.
00:20:44 13 MR. HARTZOG: Sure.
00:22:04 14 THE COURT: Okay. I'm sorry. I thought you
00:22:06 15 said paragraph 17. And what I've been pointed to,
00:22:10 16 101-15, ends at paragraph 14.
00:22:17 17 MS. BEIGHTOL: I believe that's the
00:22:18 18 declaration.
00:22:19 19 MR. HARTZOG: It's an attachment to the
00:22:21 20 declaration, Your Honor.
00:22:22 21 THE COURT: An attachment. Okay.
00:22:25 22 MR. HARTZOG: Is what I'm currently looking
00:22:27 23 at. It may be in her statement as well. Let me pull
00:22:31 24 that up. I believe it's Exhibit C to that declaration.
00:22:41 25 THE COURT: Let me look at that then.

00:24:15 1 I think it's a backdoor effort to run around
00:24:22 2 the Court's earlier ruling where the thrust of this is
00:24:26 3 still a response to Dr. Foran, albeit paragraph 17 does
00:24:36 4 not reference him, the thread throughout this is this
00:24:44 5 expert's disagreement with the opinions of Foran.

00:24:51 6 MR. HARTZOG: Your Honor, if we limit Ms.
00:24:53 7 Clement's testimony to only that paragraph, that's all
00:24:58 8 we're seeking is that she be allowed to rebut the
00:25:01 9 evidence that Officer Edwards planted the knife.

00:25:08 10 THE COURT: All right. But we get back to
00:25:13 11 plaintiff's motion. Do you want to be heard further?

00:25:18 12 MS. BEIGHTOL: Yes, Your Honor. I'd like to
00:25:20 13 be heard on that issue. And if we haven't closed the
00:25:22 14 issue of Bracamontes, I'd like to speak to that as well.

00:25:25 15 THE COURT: I don't think we have to get to
00:25:27 16 Bracamontes if Clement doesn't come. Is that a fair
00:25:31 17 statement?

00:25:32 18 MR. HARTZOG: Your Honor, I believe
00:25:33 19 Bracamontes could testify just to authenticate the
00:25:40 20 TrueAllele reports. Ms. Clement would provide
00:25:43 21 additional explanation. But I believe the report
00:25:45 22 speaks for itself and should be submitted to the jury as
00:25:48 23 a business record through authentication by Ms.
00:25:53 24 Bracamontes. So even if we're unable to have an expert
00:25:56 25 testify as to some specifics of what that report means,

00:26:00 1 I believe the report itself should be presented to the
00:26:04 2 jury through Ms. Bracamontes.

00:26:06 3 THE COURT: Okay.

00:26:07 4 MS. BEIGHTOL: As it relates to Clement,
00:26:10 5 which I understand we're still on at the moment --

00:26:14 6 THE COURT: Then we can go to Bracamontes
00:26:15 7 and the admission of this report, which I assume your
00:26:18 8 motion seeks to exclude.

00:26:21 9 MS. BEIGHTOL: Yes. We seek to exclude the
00:26:23 10 report of Bracamontes and Clement and Bracamontes's
00:26:29 11 declaration, which every single paragraph actually
00:26:32 12 rebuts Dr. Foran's opinions and seeks to present expert
00:26:37 13 opinions in connection with summary judgment. That's
00:26:40 14 the Bracamontes issue.

00:26:41 15 As it relates to Clement, Your Honor, we
00:26:44 16 agree with the Court that it appears to be a backdoor
00:26:46 17 way of getting expert testimony in, the same expert
00:26:51 18 testimony that they've known -- to rebut Dr. Foran, who
00:26:55 19 was, as my co-counsel just reminded me, identified
00:26:59 20 before the disclosure deadline and in enough time for
00:27:02 21 Clement to have been identified or some other expert in
00:27:05 22 the case in chief.

00:27:07 23 If that testimony was sought to be entered
00:27:09 24 in their case in chief, this request should have been
00:27:12 25 long ago.

00:27:14 1 Moreover, and probably more important as it
00:27:17 2 relates to the specific issue we're talking about, we
00:27:20 3 don't know if there were gloves on and whether there
00:27:23 4 would be fingerprints or not. It's not determinative
00:27:26 5 of that issue anyway.

00:27:28 6 But as it relates to Dr. Foran --

00:27:32 7 THE COURT: Let me just make sure I
00:27:33 8 understand the full import of your statement. We don't
00:27:36 9 know if gloves were on. Do you want to expand on that?

00:27:41 10 MS. BEIGHTOL: Sure. There are two
00:27:42 11 witnesses that are uninvolved that witnessed this that
00:27:47 12 were able to see whether or not something was in the
00:27:49 13 hands of Soheil. Both testified that there wasn't
00:27:53 14 anything in the hands.

00:27:56 15 Defendant Edwards says that Soheil had a
00:27:59 16 knife during the incident.

00:28:01 17 So there is conflicting fact testimony.

00:28:03 18 We do not have a video because the body
00:28:05 19 camera wasn't turned on by defendant Edwards.

00:28:08 20 THE COURT: Who would be wearing the gloves?

00:28:10 21 MS. BEIGHTOL: In other words, if it was
00:28:11 22 planted, if the knife was planted, if there is no
00:28:14 23 fingerprint on the knife, then it could be because
00:28:19 24 someone was wearing gloves and planted it. So, in
00:28:22 25 other words, it goes -- it isn't determinative of the

00:28:25 1 issue one way or the other whether there is fingerprint
00:28:28 2 evidence on the knife.

00:28:29 3 It would be as relates to Soheil, but I
00:28:33 4 don't think anyone here disputes that there is a
00:28:34 5 photograph of Soheil with the knife in his hand, and
00:28:38 6 certainly fingerprints could have been transferred from
00:28:40 7 that -- I'm sorry; I mean DNA from that.

00:28:47 8 THE COURT: Okay.

00:28:48 9 MR. HARTZOG: Your Honor, this is the first
00:28:49 10 time I've ever heard the word "glove" in this case.
00:28:52 11 That has not been in evidence, it has not come up. You
00:28:55 12 can see on the video when he exits his vehicle he's not
00:28:58 13 wearing gloves. You can see his hands in the video.

00:29:01 14 And again, for Ms. Bracamontes, she is
00:29:05 15 only -- we're only intending to call her as an
00:29:09 16 authenticating witness, as we identify in our Rule 26
00:29:12 17 disclosures, well within the time that we had to do
00:29:15 18 that. So we're only asking that she be allowed to come
00:29:19 19 in and authenticate a document. And we identified her
00:29:23 20 as a witness to do that. I believe the document speaks
00:29:26 21 for itself.

00:29:26 22 I would like to have some explanation from
00:29:31 23 Ms. Clement, but if the Court will not allow us to do
00:29:36 24 that, I think at the very least we should be allowed to
00:29:39 25 present the document itself and let the jury give it the

00:29:44 1 weight that they believe it's due. She should be
00:29:48 2 allowed to come authenticate that testimony.

00:29:50 3 And again, as you just heard, their theory
00:29:53 4 of this planting of the knife, Ms. Clement is rebutting
00:29:57 5 that. She provides rebuttal evidence that: No, in
00:30:02 6 fact, Officer Edwards didn't plant the knife because his
00:30:05 7 DNA is not on the knife.

00:30:06 8 THE COURT: But for some reason the
00:30:08 9 defendant denominated Clement a rebuttal witness and
00:30:14 10 focused Clement on examining the opinions of Foran.

00:30:22 11 MR. HARTZOG: Your Honor, we did that in
00:30:23 12 part because of -- she was designated as a rebuttal in
00:30:27 13 part because of the timing of when we knew that we would
00:30:30 14 actually be doing DNA testing, which was after we had
00:30:33 15 disclosed our experts in the case. And so by virtue of
00:30:37 16 timing alone, we believed we needed to designate her as
00:30:40 17 a rebuttal expert.

00:30:41 18 Her opinions, as Your Honor just read
00:30:43 19 through her statement, while many of them are focused on
00:30:47 20 Dr. Foran, they are not exclusively focused on Dr.
00:30:50 21 Foran. They also focus on the evidence itself of
00:30:52 22 whether Officer Edwards's DNA was present on the knife.
00:30:56 23 And two other individuals were present on the knife.
00:31:01 24 THE COURT: It would just seem that much,
00:31:02 25 much earlier you could have done what you seek to do

00:31:08 1 now.

00:31:09 2 MR. HARTZOG: And I don't disagree with
00:31:11 3 that, Your Honor. But I think -- and I understand it's
00:31:14 4 the discretion of the Court, but I think this evidence
00:31:16 5 is so important to the case and so important that the
00:31:19 6 jury hear that we respectfully request that the Court
00:31:23 7 allow us to redesignate her, or to call -- I'm sorry,
00:31:28 8 not to redesignate, but to call her as a rebuttal to
00:31:31 9 plaintiff's evidence that Officer Edwards planted the
00:31:33 10 knife. Because I think she rebuts that. And that is
00:31:36 11 contained in her report, the rebuttal evidence that we
00:31:39 12 intend to present on that issue.

00:31:42 13 THE COURT: Okay. Did you want to say
00:31:45 14 anything else?

00:31:46 15 MS. BEIGHTOL: I do. And I hate to belabor
00:31:48 16 this point. If it was so important, it should have
00:31:51 17 been -- a motion to designate her in the case in chief
00:31:59 18 untimely way back in December 2021. This is not so
00:32:04 19 important -- it may be so important because trial is
00:32:06 20 coming up, but these facts have been known for a long
00:32:09 21 time.

00:32:11 22 More importantly, we're not saying we're
00:32:13 23 arguing a glove. That's not the point. The point is
00:32:16 24 that he's trying to backdoor expert testimony in to
00:32:19 25 rebut now eyewitness testimony, which is not what his

00:32:25 1 designation of expert witnesses -- which, by the way,
00:32:28 2 was not by the time of the expert witness deadline and
00:32:31 3 could have been -- says. That actually specifically
00:32:35 4 says that she's being designated to, and I quote, and
00:32:39 5 this is all it says in the designation, "to offer
00:32:43 6 rebuttal testimony to the opinions of David R. Foran,
00:32:47 7 Ph.D." It does not talk about other witnesses. It
00:32:51 8 doesn't talk about anything else.

00:32:54 9 And following that, Defendant Edwards twice
00:32:58 10 in two separate motion, the second one after permission
00:33:01 11 from the Court, moved to exclude Dr. Foran, the very
00:33:04 12 person that she was identified to rebut.

00:33:08 13 It puts us, the plaintiff, in a very
00:33:10 14 precarious and prejudicial position.

00:33:13 15 THE COURT: What's your argument about
00:33:15 16 introduction of the underlying report?

00:33:18 17 MS. BEIGHTOL: As far as the underlying
00:33:20 18 report, are you meaning the report of Ms. Clement, the
00:33:26 19 supplemental report?

00:33:27 20 THE COURT: No, the Cybergeneitics report.

00:33:32 21 MS. BEIGHTOL: I mean, Bracamontes signed
00:33:34 22 that report, was one of those signators on that report.
00:33:39 23 She was known as soon as that report came out. Her
00:33:42 24 name has never been identified in this case until --

00:33:46 25 THE COURT: But just as the custodian. It's

00:33:49 1 a business record, he says. He's not going to ask her
00:33:52 2 any questions; the report speaks for itself; It should
00:33:55 3 come in. I mean, I'm kind of paraphrasing the
00:33:58 4 defendant's -- is that a fair paraphrasing?

00:34:03 5 MR. HARTZOG: Fair characterization.

00:34:05 6 MS. BEIGHTOL: The problem with the report is
00:34:07 7 two-fold, and Bracamontes as the witness to authenticate
00:34:09 8 it. Bracamontes's affidavit in this case or
00:34:12 9 declaration in this case is point by point, it's pages
00:34:15 10 long. I can find the cite to it if you'd like to look
00:34:18 11 at it. Every single paragraph talks about her opinions
00:34:21 12 against Dr. Foran, even giving legal opinions about
00:34:26 13 whether his testimony should be excluded. This is not
00:34:29 14 a witness -- if she goes before the jury and there is
00:34:33 15 any hint of that, she is not just authenticating, she is
00:34:37 16 giving expert witness testimony.

00:34:39 17 THE COURT: But I can control that. I'm
00:34:40 18 the judge. So what if the judge controlled that, and
00:34:46 19 it just came in through her?

00:34:48 20 MS. BEIGHTOL: The next problem becomes
00:34:50 21 you're now entering a DNA analysis in front of the jury
00:34:57 22 without plaintiff having the opportunity to have a
00:35:01 23 witness to talk about it, nor defense. Because again,
00:35:06 24 this is a problem of Defendant Edwards's making. We
00:35:11 25 identified in our case in chief a DNA expert. He

00:35:14 1 sought to exclude him and only identified someone to
00:35:17 2 rebut him. Now in the place where a report comes in
00:35:20 3 that is not explained before the jury, it becomes a
00:35:22 4 waste of time and could absolutely confuse and mislead
00:35:25 5 the jury and, in fact, likely will because it's
00:35:28 6 something -- if you want to look at, Your Honor, I'm
00:35:30 7 sure Defendant Edwards can give you the cite. It's one
00:35:33 8 that he's identified. But it is pages and pages of
00:35:36 9 complex DNA information.

00:35:38 10 THE COURT: Let me look at it. What's the
00:35:41 11 docket number, Mr. Hartzog?

00:35:58 12 MR. HARTZOG: I believe it is DE 164-5, DE
00:36:04 13 164-5.

00:37:27 14 THE COURT: Well, let's just let me enter a
00:37:33 15 ruling that's not very challenging. A great deal of
00:37:37 16 this report has to do with what other courts have done,
00:37:43 17 beginning on page 6 of 22. And a laundry list of
00:37:55 18 different court cases are listed.

00:37:58 19 MR. HARTZOG: And we are not even seeking
00:38:00 20 entry of that portion of the report, Your Honor.

00:38:02 21 THE COURT: So I would certainly exclude
00:38:03 22 pages up to and through page 13. And I don't think we
00:38:18 23 need her curriculum vitae, which would be the pages that
00:38:25 24 follow, about what classes she's taught and so forth, if
00:38:32 25 she's being used only in the way that alternatively

00:38:37 1 defendant would now seek to use her.

00:38:41 2 So now what we're really talking about, if

00:38:45 3 I'm remembering where I started, was everything ahead of

00:38:48 4 page 6. Let's go up and look at that.

00:38:58 5 MR. HARTZOG: Pages 1 through 5, Your Honor.

00:39:01 6 THE COURT: All right.

00:39:04 7 MS. BEIGHTOL: Your Honor, I just want to be

00:39:05 8 sure, because I don't have it in front of me. Are we

00:39:07 9 looking at the TrueAllele report, or are we looking at

00:39:11 10 her declaration?

00:39:13 11 MR. HARTZOG: The Cybergeneitics report, DE

00:39:16 12 164-5.

00:39:19 13 THE COURT: And now the request has been

00:39:20 14 clarified to just be pages 1 through 5, the actual

00:39:25 15 report itself.

00:39:43 16 So the Bode Technology report that's

00:39:47 17 referenced on the first page of the Cybergeneitics

00:39:53 18 report, if I turn through this pretrial order, would I

00:39:59 19 find that listed as a proposed exhibit?

00:40:01 20 MR. HARTZOG: Yes, Your Honor.

00:40:09 21 THE COURT: So who's coming in to testify

00:40:11 22 about the Bode Technology report?

00:40:13 23 MR. HARTZOG: Oh, I'm sorry. The Bode

00:40:16 24 Technology report? I'm sorry, Your Honor. Can you

00:40:24 25 point me to which portion you're talking about?

00:40:26 1 THE COURT: The first page, the first bullet
00:40:28 2 under "Methods" in the Cybergeneitics report. It says,
00:40:33 3 "The DNA PowerPlex Fusion 6C data profiles referenced in
00:40:40 4 this report were previously developed and addressed in a
00:40:45 5 Laboratory Report issued by the North Carolina State
00:40:51 6 Crime Laboratory and a Forensic Case Report issued by
00:40:55 7 Bode Technology."

00:40:57 8 So I really should put an "S" when I asked
00:41:01 9 you if I turn the pages of this pretrial order, would I
00:41:05 10 see those two reports in your case in chief?

00:41:11 11 MR. HARTZOG: Your Honor, I cannot recall if
00:41:12 12 we included that because those were the SBI reports that
00:41:16 13 were inconclusive. So they don't really have value to
00:41:19 14 the case. They may be listed, but I cannot recall if
00:41:27 15 we listed those. Let me take a look. I think we were
00:41:31 16 counting on only the Cybergeneitics report, because
00:41:34 17 that's the only one that reached any conclusion.

00:41:37 18 THE COURT: Counsel for plaintiff, were you
00:41:39 19 proposing to introduce either the North Carolina State
00:41:41 20 Crime Laboratory Report or the Forensic Case Report
00:41:47 21 issued by Bode Technology?

00:41:49 22 MS. BEIGHTOL: No, Your Honor.

00:42:03 23 THE COURT: That would be a question I would
00:42:04 24 have if I was sitting on a jury in a case where I was
00:42:07 25 presented with these five pages. I would wonder where

00:42:16 1 those two reports are. I would sit there and speculate
00:42:19 2 as to what they said. And that's not the way a jury
00:42:23 3 should make a decision.

00:42:30 4 MR. HARTZOG: Your Honor, I would suggest we
00:42:32 5 do have Elizabeth Patel designated as a witness from the
00:42:39 6 Crime Lab who could speak to that report without
00:42:42 7 introducing it because, again, they determined that
00:42:44 8 there was not enough data to make a conclusion. So
00:42:47 9 Elizabeth Patel has been listed as a witness in this
00:42:50 10 case. She is from the State Crime Lab and could speak
00:42:54 11 to that.

00:42:55 12 Or in the alternative, Your Honor, we could
00:42:57 13 redact that portion of the report.

00:42:59 14 But I think Elizabeth Patel could speak to
00:43:02 15 that and say: We did this testing through Bode
00:43:04 16 Technology and were unable to reach any conclusions.
00:43:08 17 So Elizabeth Patel, I believe, could clarify that piece.

00:43:15 18 THE COURT: She works for State of North
00:43:17 19 Carolina?

00:43:17 20 MR. HARTZOG: She works for the State Crime
00:43:19 21 Lab who did the testing.

00:43:20 22 THE COURT: So she wouldn't have done the
00:43:21 23 Bode Technology Forensic Case Report, because wasn't
00:43:25 24 that outsourced?

00:43:27 25 MR. HARTZOG: It was outsourced by the State

00:43:30 1 Crime Lab. I think they just used that laboratory
00:43:31 2 testing. But it was done through the State Crime Lab.
00:43:35 3 So she would be the person who could speak to that
00:43:39 4 process and that report.

00:43:46 5 MS. EDWARDS: Your Honor, if I may. I'm
00:43:48 6 sorry, Mr. Hartzog, but I don't think that's correct.
00:43:50 7 I think the Bode Technology report was when Officer
00:43:55 8 Edwards's DNA was run by Bode Laboratories in Virginia,
00:44:01 9 not through the State Crime Lab.

00:44:03 10 MR. HARTZOG: I apologize, Your Honor. I
00:44:04 11 misspoke on that. I apologize.

00:44:10 12 That's just the report where they collected
00:44:12 13 his DNA. This is the running of the DNA. So Officer
00:44:15 14 Edwards could speak to: I submitted my DNA to this
00:44:18 15 laboratory that did testing. All they did was collect
00:44:21 16 the DNA. The Cybergeneitics report is the testing of
00:44:24 17 the DNA. So Officer Edwards would be able to clarify:
00:44:27 18 I submitted my DNA for testing, and Ms. Bracamontes
00:44:45 19 could testify that they tested the DNA that Officer
00:44:47 20 Edwards submitted. And it actually says in the report
00:44:50 21 itself what was tested: The knife, Officer Edwards's
00:44:54 22 DNA, and Mr. Mojarrad's DNA. So I don't think there's
00:44:58 23 any risk of jury confusion for that because Officer
00:45:01 24 Edwards could testify to what he did as part of the
00:45:03 25 process and submitting his DNA. The report speaks to

00:45:07 1 what was tested and what the results were. They can be
00:45:10 2 authenticated by Ms. Bracamontes.

00:45:19 3 And again, Your Honor, this is an exhibit
00:45:20 4 that has long been identified in our case in chief. It
00:45:23 5 was in our disclosure, in our initial disclosures, our
00:45:27 6 supplemental initial disclosures. It was produced in
00:45:30 7 discovery long ago. Plaintiff's counsel has known that
00:45:33 8 we were going to be using this report. We've
00:45:35 9 identified an authenticating witness for it. So
00:45:39 10 there's no issue of surprise or anything like that. We
00:45:47 11 want the jury to know Officer Edwards was willing to
00:45:48 12 submit his DNA, did submit his DNA, and these are the
00:45:51 13 results of the analysis of it. I think that's fair
00:45:54 14 game for the jury to hear, particularly where the
00:45:56 15 allegation is that he planted the knife in Mr.
00:46:00 16 Mojarrad's hand.

00:46:04 17 THE COURT: But the State of North Carolina,
00:46:07 18 when it tested the knife --

00:46:11 19 MR. HARTZOG: They used a different process
00:46:13 20 that is less -- in fact, they now use a process like
00:46:18 21 this TrueAllele. And Ms. Patel is going to be able to
00:46:24 22 testify to that as well, that they now use this same
00:46:27 23 type of process in testing DNA. So had they tested the
00:46:31 24 DNA today, they would be using this same test. But
00:46:38 25 because it was tested back before they had this

00:46:40 1 capability, they used a different DNA test that is less
00:46:44 2 accurate. This is the standard DNA process that they
00:46:49 3 now use.

00:46:49 4 THE COURT: Ms. Patel, what's her capacity
00:46:52 5 at the lab?

00:46:59 6 MR. HARTZOG: She does forensics, I believe,
00:47:00 7 at the State Crime Lab. She is the one that was
00:47:03 8 involved -- she's assistant director of the North
00:47:06 9 Carolina laboratory.

00:47:16 10 THE COURT: All right. You listed her
00:47:21 11 properly in your case in chief?

00:47:23 12 MR. HARTZOG: We did, Your Honor. She's
00:47:27 13 been identified in our pretrial disclosure. She's been
00:47:32 14 identified in initial disclosures. Plaintiff's counsel
00:47:37 15 has long been aware of the SBI personnel and the State
00:47:43 16 Crime Lab who did this testing. In fact, that's why
00:47:45 17 plaintiff's counsel requested additional testing is
00:47:48 18 because the SBI's -- or the State Crime Lab's testing
00:47:51 19 was inconclusive.

00:47:53 20 THE COURT: Are you seeking to offer her as
00:47:55 21 an expert, as a fact witness, or both?

00:47:59 22 MR. HARTZOG: As a fact witness, Your Honor.

00:48:08 23 THE COURT: All right.

00:48:09 24 MR. HARTZOG: Again, we believe the report
00:48:11 25 speaks for itself and doesn't need any expert testimony.

00:48:15 1 It's just a business record that we would like the jury
00:48:17 2 to be aware of. And it's been listed since we had it
00:48:24 3 in our case in chief.

00:48:32 4 THE COURT: Now, he says she's going to be a
00:48:36 5 fact witness, Ms. Patel. So I don't see your motion to
00:48:39 6 exclude expert testimony in the field of forensic DNA to
00:48:44 7 reach her.

00:48:47 8 MS. BEIGHTOL: Well, if I may, Your Honor,
00:48:48 9 I'd like to take a step back and clarify something for
00:48:51 10 the record. Ms. Patel cannot speak to factually or
00:48:55 11 otherwise the Bode report. She had nothing to do with
00:48:59 12 the Bode report. And though they might run reports
00:49:02 13 like that, they did not run the Bode report. So the
00:49:05 14 Bode report is still a missing link in the document
00:49:09 15 they're seeking to enter, the Cybergeneitics document.

00:49:13 16 And the discussion that we're having is
00:49:15 17 illustrative of the confusion and misleading of the jury
00:49:18 18 that we're concerned would happen if that report were
00:49:20 19 entered. There are multiple parts to it. It is
00:49:23 20 essentially being offered through Ms. Bracamontes, who I
00:49:28 21 encourage you to look at her declaration, because it is
00:49:32 22 explicitly and almost exclusively related to Dr. Foran.

00:49:36 23 THE COURT: But, see, I'm the judge. I'm
00:49:38 24 putting that to the side. His plan B argument is: I
00:49:44 25 just want her to get that report in. Okay. So let's

00:49:49 1 accept that. And let's push the other stuff to the
00:49:52 2 side.

00:49:53 3 MS. BEIGHTOL: As it relates to the Bode, he
00:49:56 4 does not have a witness to talk about that, including
00:49:59 5 Defendant Edwards.

00:50:01 6 THE COURT: Does that go to the strength,
00:50:08 7 the weight of the evidence? Because the point you're
00:50:10 8 making is that if I let in the Cybergeneitics report, the
00:50:16 9 first sentence makes reference to a report run by Bode
00:50:21 10 Technology, and that's not in evidence.

00:50:24 11 MS. BEIGHTOL: It's not in evidence. It
00:50:25 12 won't be explained to the jury, and it would be
00:50:28 13 confusing and misleading as a result. That was run
00:50:31 14 through plaintiff's counsel, and it's a report that --
00:50:36 15 all of this is about what expert was in the case, which
00:50:40 16 is Dr. Foran, who has been sought to be withdrawn by
00:50:43 17 Defendant Edwards and then is effectively withdrawn now.
00:50:47 18 And so without that testimony to put the pieces
00:50:50 19 together, we're left with the fact witness that he's
00:50:54 20 referencing who can speak to crime laboratory stuff,
00:50:58 21 which is mentioned in that first sentence, but she can't
00:51:02 22 speak to that report. There's no one to speak to the
00:51:04 23 Bode report.

00:51:05 24 THE COURT: Can I interrupt and just ask a
00:51:06 25 question?

00:51:07 1 MS. BEIGHTOL: Sure.

00:51:07 2 THE COURT: Kind of following what you're

00:51:09 3 saying. So the North Carolina State Crime Laboratory

00:51:14 4 at the time that it issued its Laboratory Report did not

00:51:19 5 have the Bode Technology Forensic Case Report; yes?

00:51:25 6 MS. BEIGHTOL: Yes.

00:51:26 7 THE COURT: So the speculation would be in

00:51:28 8 part: How would the North Carolina State Crime

00:51:34 9 Laboratory's test have been influenced or not had it had

00:51:38 10 access to the Bode report? Is that a concern of yours?

00:51:44 11 MS. BEIGHTOL: I think --

00:51:47 12 MS. EDWARDS: Your Honor, just for

00:51:49 13 clarification purposes, if it's helpful, the Bode

00:51:54 14 Technology report was the running of Officer Edwards's

00:51:58 15 DNA and the determination of what his DNA profile was.

00:52:00 16 THE COURT: So the State didn't have his DNA

00:52:02 17 profile at the time it did its report?

00:52:06 18 MS. EDWARDS: Correct, Your Honor.

00:52:07 19 THE COURT: But Cybergeneitics had it? It

00:52:11 20 had Edwards's DNA?

00:52:14 21 MS. EDWARDS: Correct, Your Honor. And it

00:52:15 22 relied on the Bode Technology.

00:52:18 23 THE COURT: So the State was just looking:

00:52:20 24 Is there anybody's DNA on this knife, right?

00:52:22 25 MS. EDWARDS: Correct.

00:52:23 1 THE COURT: So the Cybergene~~t~~tics report is:
00:52:25 2 Can we exclude -- well, I guess: Can we exclude
00:52:29 3 Edwards? Or: Who's DNA is it between the two? Or is
00:52:33 4 it looking at everybody's DNA? What's the
00:52:38 5 Cybergene~~t~~tics focus?

00:52:40 6 MR. HARTZOG: What they do is they look at
00:52:42 7 everybody's DNA.

00:52:43 8 THE COURT: Just like the State did.

00:52:45 9 MR. HARTZOG: Right. But they specifically
00:52:46 10 tested against the DNA samples that they had from
00:52:51 11 Officer Edwards and Mr. Mojarrad.

00:52:54 12 THE COURT: So Soheil, the State didn't have
00:53:02 13 Soheil's DNA?

00:53:04 14 MS. EDWARDS: The State did have Soheil's
00:53:06 15 DNA, Your Honor, yes.

00:53:09 16 THE COURT: But it just didn't have
00:53:11 17 Edwards's?

00:53:12 18 MS. EDWARDS: Correct, Your Honor.

00:53:17 19 THE COURT: Okay. So I interrupted you. We
00:53:28 20 were on Ms. Patel. It was kind of like: She can't do
00:53:37 21 this; she can't do that.

00:53:39 22 MS. BEIGHTOL: Correct. As it relates to
00:53:42 23 Ms. Patel, we don't have a conflict with her being a
00:53:45 24 fact witness about things about which she can speak,
00:53:48 25 which is the crime lab report -- am I correct on that --

00:53:53 1 that she can talk about and authenticate. It's the
00:53:57 2 Bode piece and the Cybergenetics piece that we have
00:54:02 3 concern with.

00:54:03 4 And if I'm following the train correctly --
00:54:06 5 which maybe I'm not, to be fair -- I think we got to Ms.
00:54:11 6 Patel because we were troubled by the paragraph in the
00:54:14 7 Cybergenetics report. And this all goes back to the
00:54:19 8 Cybergenetics report all of this is attempting to rebut.

00:54:22 9 And our position is that that ship has
00:54:26 10 sailed with the withdrawal of Foran; that withdrew
00:54:31 11 Clement.

00:54:31 12 And you keep hearing, Your Honor, from Mr.
00:54:36 13 Edwards's counsel that this has been known about for a
00:54:39 14 long time. That's exactly right. And the Bode report
00:54:42 15 wasn't put on the exhibit list. No one was identified
00:54:45 16 as an expert in the case in chief until this latest
00:54:48 17 attempt. And I just don't think it's fair to put ten
00:54:51 18 individuals in the box and show them that without having
00:54:54 19 the people who can properly explain it. And we don't
00:54:58 20 have those people. That is evident. We have no expert
00:55:02 21 witnesses to explain it.

00:55:04 22 And, I mean, I've got a law degree, and the
00:55:09 23 genetics stuff is really hard to understand. And it's
00:55:12 24 not just a summary report that gets you there.

00:55:15 25 I am troubled. I believe the Court has the

00:55:18 1 discretion and will be very careful with Bracamontes if
00:55:22 2 she comes in, but her report goes above and beyond what
00:55:29 3 is appropriate for her specialty, dances into the area
00:55:33 4 of legal allegations of what is and should not be
00:55:39 5 excluded. And I think it's just really hard to put
00:55:42 6 that one page or five pages before the jury and ask them
00:55:45 7 to understand it.

00:55:50 8 And I think it's prejudicial because it will
00:55:52 9 confuse and mislead them. It will waste time. And I
00:55:55 10 think it's -- you know, especially in a situation where
00:55:59 11 if the evidence is or is not on the knife is not
00:56:02 12 necessarily determinative of whose hand it was in and
00:56:05 13 when.

00:56:06 14 THE COURT: So your motion should be read as
00:56:07 15 seeking to strike. Did you object to this? Yes?

00:56:12 16 MS. BEIGHTOL: We object to the entire
00:56:15 17 shebang of the DNA evidence, without -- with the experts
00:56:20 18 not there to discuss them.

00:56:21 19 THE COURT: So what the jury is going to
00:56:23 20 hear then is Patel is going to come up, Patel is going
00:56:31 21 to say: Yes, we analyzed the knife, and our results
00:56:35 22 were not conclusive.

00:56:36 23 MS. BEIGHTOL: And that can be entered
00:56:38 24 because that has been identified; that has been -- he is
00:56:41 25 absolutely correct that we knew that those witnesses may

00:56:44 1 be in this trial. We knew that that document may be in
00:56:46 2 this trial. And that has been advised to us
00:56:51 3 previously. What hasn't is the rest of this, is the
00:56:54 4 rebuttal piece.

00:56:56 5 THE COURT: Let me think about it.

00:57:05 6 MR. HARTZOG: Can I add one clarifying point
00:57:06 7 here? The Bode report is pretty much the raw data that
00:57:10 8 is used. I don't think that piece is helpful without
00:57:14 9 expert testimony. The results, I think, on the letter
00:57:19 10 are what speak for themselves. And Officer Edwards
00:57:22 11 should be able to testify that: I submitted my DNA
00:57:25 12 because I know I didn't touch the knife. And I got
00:57:29 13 this report back that is authenticated from Ms.
00:57:33 14 Bracamontes. That's how we intend to introduce it, Your
00:57:39 15 Honor.

00:57:43 16 I think the raw data, to the extent the
00:57:46 17 Court believes that raw data report is necessary, we
00:57:50 18 would seek leave of Court to add that in as an exhibit.
00:57:53 19 We don't believe it's necessary because we believe the
00:57:56 20 report speaks for itself.

00:58:02 21 And also, Your Honor, I do think it would be
00:58:04 22 prejudicial to have the jury hear that it was
00:58:06 23 inconclusive without hearing that subsequent testing was
00:58:10 24 done that is not inconclusive.

00:58:12 25 THE COURT: It's kind of about how you

00:58:13 1 prepared your case, too, isn't it?

00:58:15 2 MR. HARTZOG: I suppose so, Your Honor.

00:58:17 3 But again, we have identified this report all along.

00:58:21 4 The minute we got it, we put it in our pretrial

00:58:23 5 disclosures. We put an authenticating witness in to our

00:58:27 6 pretrial disclosures. We identified an expert to talk

00:58:30 7 about it. Granted, we did it as a rebuttal because of

00:58:33 8 the stature of the case and our deadline for case in

00:58:37 9 chief experts had passed. And it wasn't until they

00:58:40 10 withdrew on December 7th that that caused Ms. Clement to

00:58:45 11 not be available as a witness, and that's why we moved

00:58:48 12 to redesignate. Prior to December 7th she was on the

00:58:51 13 witness list, and everyone assumed she would be called.

00:58:55 14 They only withdraw their expert once we said: Hey, we

00:58:59 15 realize that there's this issue with our expert being a

00:59:03 16 rebuttal expert.

00:59:06 17 So I think what this is is sort of what is

00:59:11 18 referred to in the case law as, you know, kind of games

00:59:16 19 with discovery and litigation preventing the jury from

00:59:18 20 hearing the facts of the case. We believe this is a key

00:59:21 21 fact in the case.

00:59:25 22 THE COURT: You attacked Foran. You sought

00:59:31 23 for the Court to exclude Foran. And as the Court was

00:59:35 24 considering the motion. The plaintiff withdraw Foran.

00:59:40 25 MR. HARTZOG: Right, Your Honor. And we

00:59:41 1 realized during that process that this was an issue.
00:59:45 2 And that's when we contacted plaintiff's counsel with
00:59:48 3 our proposal to redesignate in exchange for withdrawing
00:59:53 4 our motion on Foran, to allow them both to testify. I
00:59:56 5 think that's probably when plaintiff's counsel realized
00:59:59 6 this was an issue and withdrew Foran affirmatively.
01:00:03 7 But in any event, when we realized that this was an
01:00:06 8 issue, we moved the Court; we let plaintiff's counsel
01:00:09 9 know that we were intending to do this. But the report
01:00:12 10 itself has been in evidence and been identified as
01:00:15 11 evidence since we received it in March of 2022, along
01:00:20 12 with an authenticating witness. When we supplemented
01:00:24 13 our initial disclosures, we identified that report as an
01:00:28 14 exhibit we intended to use, and we identified a witness
01:00:30 15 to authenticate it.

01:00:32 16 THE COURT: Well, I have no doubt that if I
01:00:34 17 tell you that Ms. Bracamontes cannot say such and such
01:00:43 18 and such and such, that you would instruct her
01:00:46 19 accordingly.

01:00:47 20 MR. HARTZOG: Of course, Your Honor.

01:00:48 21 THE COURT: So I think I can take care of
01:00:50 22 that part of the concern. But there are some issues
01:00:53 23 that are all tied up in this. But I didn't know there
01:00:55 24 was a word "octillion" until I read this report. Who
01:01:01 25 is going to explain what octillion means? You say it's

01:01:06 1 self-evident. Does everybody know what octillion is?

01:01:11 2 Is it just me? I didn't know what it was. I still
01:01:11 3 don't know what it is.

01:01:12 4 MR. HARTZOG: I think the jury can
01:01:14 5 understand it's a large number. And I think that's the
01:01:16 6 important piece of this is that it's very unlikely that
01:01:19 7 he touched the knife. And I think that's essentially
01:01:21 8 what the report says, that it's this times less likely
01:01:25 9 that he touched the knife, and it's this times more
01:01:29 10 likely that Mr. Mojarrad touched the knife. I don't
01:01:32 11 think that's misleading or confusing to the jury. I
01:01:34 12 think those numbers just speak for themselves. One is
01:01:37 13 likely to have touched the knife. One is unlikely to
01:01:40 14 have touched the knife. If you read that report,
01:01:42 15 that's the conclusion you draw. I think it speaks for
01:01:45 16 itself, Your Honor.

01:01:49 17 THE COURT: Well, what's major, what's
01:01:52 18 minor? Octillion is major and trillion is minor. What
01:01:56 19 does that mean? I'm a little confused by that.

01:01:58 20 MR. HARTZOG: Well, I think we all know that
01:02:00 21 octillion is a larger number than trillion. So I think
01:02:06 22 it's -- we can have a witness say what number octillion
01:02:11 23 is, that it's this many zeros. I don't think you need
01:02:14 24 an expert opinion for that.

01:02:16 25 THE COURT: But contributor major is one in

01:02:20 1 4.06 octillion; contributor minor is one in 25 trillion.

01:02:27 2 I'm just trying -- if this speaks for itself, I'm just

01:02:30 3 trying to understand: What is it saying to me?

01:02:33 4 MR. HARTZOG: It simply says that it is very

01:02:36 5 unlikely, extremely unlikely that Officer Edwards's DNA

01:02:41 6 is on the knife, and it is extremely likely that Mr.

01:02:44 7 Mojarrad's DNA is on the knife.

01:02:46 8 THE COURT: Because the baseline for it

01:02:50 9 being Officer Edwards's DNA is one in 25 trillion.

01:02:57 10 MR. HARTZOG: I think, as the report says,

01:03:00 11 someone with the same genetic -- a white male, it is --

01:03:07 12 Officer Edwards is less likely -- that many times less

01:03:10 13 likely than the average white male to be the one to have

01:03:13 14 touched the knife.

01:03:14 15 THE COURT: Well, there is a lot to unpack

01:03:17 16 here.

01:03:21 17 MR. HARTZOG: Well, I agree, Your Honor.

01:03:22 18 But I do think the report is key evidence in this case.

01:03:26 19 And again, Officer Edwards is accused in this case of

01:03:30 20 shooting someone and then planting a knife on them.

01:03:34 21 Our contention is that he did not do that. And this

01:03:36 22 evidence, this DNA evidence shows in our mind that he

01:03:41 23 did not touch that knife. And that is key evidence in

01:03:44 24 this case that we believe a jury should hear and should

01:03:49 25 be able to consider. And Officer Edwards should be

01:03:51 1 able to testify that: I was very confident that I did
01:03:55 2 not touch that knife, and I submitted my DNA evidence to
01:03:58 3 be tested against the knife. And it turns out that
01:04:03 4 this report was generated, and it speaks for itself. He
01:04:07 5 don't even have to say what the report says. But I
01:04:09 6 think a jury can see that report and see that it's very
01:04:11 7 unlikely that Officer Edwards touched that knife. And
01:04:14 8 I think that when Officer Edwards is accused of shooting
01:04:18 9 someone and then planting a knife on them, I think he is
01:04:21 10 entitled to present some evidence that that didn't
01:04:23 11 happen. And this is that evidence. This is part of
01:04:27 12 that evidence, that he did not do this, what they're
01:04:31 13 accusing him of. So we think this is very, very
01:04:33 14 important evidence in this case.

01:04:35 15 And I understand Your Honor's ruling on the
01:04:38 16 expert issue. But at the very least the jury should be
01:04:40 17 allowed to see this report that we've identified for
01:04:44 18 years in this case.

01:04:46 19 THE COURT: Does your motion for
01:04:48 20 introduction of this report include page 4 of it?

01:04:55 21 MR. HARTZOG: I believe we just identified
01:04:56 22 the report, but if there are aspects to the report that
01:04:59 23 Your Honor needs to be redacted, we can certainly do
01:05:02 24 that.

01:05:02 25 THE COURT: I'm just wanting to know what

01:05:03 1 the scope of the motion is. We've taken off pages 6 to
01:05:07 2 the end because, as I mentioned, the fact that where
01:05:16 3 this type of science was used, what other court cases
01:05:21 4 just doesn't really resonate with me as a report; it's
01:05:27 5 more argument.

01:05:29 6 But I'd like over the lunch hour for you to
01:05:33 7 look at page 4 and tell me, this page with all of these
01:05:38 8 references and with this -- maybe a little bit of
01:05:44 9 hearsay as to how this case work method works; are you
01:05:51 10 trying to get this in as part of the report? Where,
01:05:58 11 for example, one paragraph reads: "Over 40 TrueAllele
01:06:03 12 validation studies have been conducted to establish the
01:06:08 13 reliability of the method. Eight of these studies have
01:06:11 14 been published in peer-reviewed scientific journals on
01:06:15 15 both synthetic and case work data. There are related
01:06:21 16 papers on data analysis validation and error reporting.
01:06:27 17 TrueAllele has been empirically tested and complies with
01:06:31 18 six national standards for validating probabilistic
01:06:36 19 genotyping systems and other performance criteria."

01:06:42 20 Do you want to take a look at it over the
01:06:44 21 lunch hour?

01:06:45 22 MR. HARTZOG: Sure, Your Honor. I'll be
01:06:46 23 happy to address that.

01:06:48 24 THE COURT: In which case, what you're
01:06:50 25 looking at is the bare bones pages 1, 2 and 3, and the

01:06:56 1 signature page, which is 5, if you're not seeking to
01:07:02 2 introduce page 4.

01:07:09 3 MR. HARTZOG: I think we'd probably be okay
01:07:12 4 with that. I'll take a look at page 4 over the lunch
01:07:16 5 break and present arguments on that.

01:07:17 6 THE COURT: So what plaintiff is emphasizing
01:07:19 7 is that your motion seeking to exclude testimony
01:07:23 8 embraces this document seeking to exclude it.

01:07:29 9 MS. BEIGHTOL: Yes, Your Honor. And we also
01:07:30 10 objected in pretrial disclosures to this document.

01:07:33 11 THE COURT: On what basis?

01:07:35 12 MS. BEIGHTOL: I can pull it up.

01:07:37 13 THE COURT: Just tell me what page that was.

01:07:46 14 MS. EDWARDS: It's page 135. And then
01:07:49 15 numbers -- Exhibit 170.

01:07:58 16 MS. BEIGHTOL: And if the Court -- I'll let
01:08:01 17 you finish reading.

01:08:08 18 THE COURT: Irrelevant, more prejudicial
01:08:11 19 than probative. But what is the significance of
01:08:17 20 "Defendant was unaware of Soheil's" --

01:08:20 21 MS. BEIGHTOL: We'll redact that on the
01:08:21 22 record because it appears it was pulled over from
01:08:24 23 somewhere else. We'll take that on ourselves.

01:08:26 24 THE COURT: Okay. Your motion is allowed.
01:08:32 25 So 401, 402, 403.

01:08:36 1 MS. BEIGHTOL: Yes, Your Honor.

01:08:39 2 THE COURT: Why don't you take an hour for

01:08:41 3 lunch. Why don't you come back at 1:20; it looks like

01:08:48 4 that will give you a full hour. We'll just keep on

01:08:51 5 going. Okay.

01:10:46 6 (Recess taken.)

02:14:16 7 THE COURT: Let's pick up this very thorny

02:14:22 8 issue about DNA evidence. You're going to be arguing

02:14:29 9 it would be a reasonable inference for the jury that

02:14:32 10 Defendant Edwards planted the knife?

02:14:38 11 MS. BEIGHTOL: I'm sorry.

02:14:39 12 THE COURT: Defendant Edwards planted the

02:14:41 13 knife is going to be something that you can tell the

02:14:44 14 jury, for example, in your closing argument, that it

02:14:48 15 might be reasonable to infer under the facts? Is that

02:14:54 16 an inference --

02:14:55 17 MS. BEIGHTOL: I think what we'll tell the

02:14:57 18 jury is that Defendant Edwards said that he had it, and

02:15:00 19 two witnesses say that he didn't. And I think we'll

02:15:04 20 put that information before the jury. And as far as

02:15:07 21 the inferences from that --

02:15:09 22 THE COURT: Well, you mentioned gloves.

02:15:13 23 MS. BEIGHTOL: Only in the context of their

02:15:14 24 argument with regard to DNA. In other words, that

02:15:17 25 there are reasons there may not be DNA on the knife that

02:15:22 1 are not in the reports that we've been talking about.

02:15:26 2 In other words, no matter what the report says, that

02:15:29 3 doesn't exclude that he could have handled the knife.

02:15:39 4 (Discussion had off the record.)

02:15:39 5 MS. BEIGHTOL: And she brings up a good

02:15:41 6 point. Only if the DNA evidence comes in would we need

02:15:44 7 to go to those places, of course.

02:15:52 8 THE COURT: So Patel is not in your case in

02:15:59 9 chief? Patel from the state laboratory is not anybody

02:16:01 10 you're seeking to call in your case in chief?

02:16:04 11 MS. BEIGHTOL: We did not identify her in our

02:16:07 12 case in chief as a witness.

02:16:08 13 THE COURT: So defendant wants to bring

02:16:11 14 Patel in. You want Patel to come and testify that it

02:16:16 15 wasn't conclusive?

02:16:18 16 MR. HARTZOG: Well, Your Honor, we're --

02:16:22 17 we've got Patel on our list. We may not need to call

02:16:25 18 her on that point. But the issue, I think, is the DNA

02:16:29 19 testing. We believe the TrueAllele testing should come

02:16:34 20 in. And as part of that, I think the explanation from

02:16:38 21 Ms. Patel that here's how they did it; here's what they

02:16:41 22 were able to do. And I think Ms. Patel can also testify

02:16:44 23 that they now use this same software at -- this

02:16:48 24 probabilistic testing.

02:16:53 25 THE COURT: Have you issued your subpoenas?

02:16:55 1 MR. HARTZOG: We have, Your Honor.

02:16:56 2 THE COURT: You have?

02:16:58 3 MR. HARTZOG: Yes.

02:17:07 4 A couple other points, if I may. I wanted

02:17:09 5 to -- first of all, plaintiffs have implicated all

02:17:13 6 along, and I think they've been -- they have not come

02:17:18 7 out and said Officer Edwards planted the knife, but that

02:17:21 8 is clearly the implication that they want drawn. And,

02:17:23 9 in fact, as we cited in our reply brief on this issue,

02:17:27 10 there's been newspaper headlines that the family accuses

02:17:31 11 Officer Edwards of planting the knife. Mrs. Mojarrad in

02:17:35 12 her deposition said that she believed Officer Edwards

02:17:37 13 planted the knife. Plaintiff in their arguments on the

02:17:44 14 case have said it's a fair implication that the knife

02:17:46 15 was planted. So that is, in fact, the implication that

02:17:49 16 is being made.

02:17:52 17 I also wanted to go back, Your Honor, to

02:17:56 18 our -- their motions -- their objections to our motions.

02:18:00 19 Their only objection to the Cybergeneitics report is 401,

02:18:04 20 402, and 403. And then in their motions in limine they

02:18:08 21 only object to DNA evidence from expert testimony, which

02:18:13 22 I don't think encompasses the report itself.

02:18:16 23 THE COURT: Okay. Which was a question that

02:18:18 24 I asked, and an assumption that I made. You're

02:18:22 25 clarifying that the motion didn't reach the

02:18:24 1 Cybergene~~tics~~ics report from your view of it.

02:18:27 2 MR. HARTZOG: That's correct, Your Honor.

02:18:29 3 THE COURT: Okay. Did Foran -- can you

02:18:33 4 remind me, did he offer any opinions as to the

02:18:38 5 sufficiency or authoritativeness of the Cybergene~~tics~~ics

02:18:43 6 report?

02:18:44 7 MS. BEIGHTOL: Your Honor, we offered a

02:18:46 8 declaration in connection with our response on summary

02:18:50 9 judgment with a declaration from Dr. Foran on that

02:18:55 10 issue, and he did question the findings on that report.

02:18:59 11 And if I may, Your Honor, just -- this may help move

02:19:03 12 things along. We can agree not to make the explicit

02:19:06 13 argument that he planted the knife. I don't -- I'm

02:19:12 14 looking at my co-counsel. I don't think we've ever

02:19:15 15 explicitly made that argument. I think the only thing

02:19:18 16 we've said in passing is that looking at the image that

02:19:21 17 we have of the knife, that someone could come to that

02:19:25 18 conclusion. But we have not ourselves explicitly argued

02:19:30 19 that, nor have we offered a witness to argue that. I

02:19:33 20 think the thing that they have continued to argue is

02:19:36 21 related to a newspaper article that's out in the world

02:19:41 22 that is not a legal -- it's been in their briefing for a

02:19:45 23 long time. It's over and over again been in their

02:19:48 24 briefing, in fact, on treating physicians. But not in

02:19:52 25 ours.

02:19:53 1 THE COURT: So you wouldn't argue that to
02:19:55 2 the jury, that Officer Edwards -- that it could be
02:20:02 3 reasonable to assume that he planted the knife? You
02:20:06 4 will not argue that to the jury?

02:20:10 5 MS. EDWARDS: Your Honor, for clarification
02:20:11 6 purposes, it doesn't matter to us whether Officer
02:20:14 7 Edwards planted the knife.

02:20:15 8 There are a couple of things that do matter
02:20:17 9 to us in terms of our case and whether Officer Edwards
02:20:21 10 had the authority within the law to use deadly force.
02:20:25 11 Those things are -- one of which is: Was he armed? It
02:20:29 12 doesn't matter to us whether he pulled the knife out
02:20:33 13 himself as he was falling. It doesn't matter to us
02:20:36 14 whether some other passerby put the knife in his hand.
02:20:39 15 It doesn't matter to us at all whether -- whether or how
02:20:43 16 he came to possess the knife. If the jury were to find
02:20:46 17 that he didn't possess the knife, then Officer Edwards
02:20:49 18 would have shot an unarmed man. Whether he planted the
02:20:53 19 knife really doesn't make a difference in our opinion.

02:21:00 20 And I would just, for clarification
02:21:02 21 purposes, state that our case does not hinge upon
02:21:06 22 whether or not he had a knife.

02:21:08 23 THE COURT: Hence your objection, relevance?
02:21:12 24 MS. EDWARDS: Correct, Your Honor.
02:21:20 25 THE COURT: Does that give you any

02:21:21 1 confidence in terms of the import or lack thereof of
02:21:27 2 Clement and this DNA evidence that we could take it
02:21:29 3 completely off the lay of the land?

02:21:32 4 MR. HARTZOG: No, Your Honor. Because,
02:21:34 5 again, Officer Thompson was the next person to arrive on
02:21:38 6 the scene. And his body cam, as he walks up to the
02:21:41 7 scene, the knife is in Mr. Mojarrad's hand. So even if
02:21:46 8 they don't explicitly say Officer Edwards planted the
02:21:49 9 knife, that is the implication they want the jury to
02:21:51 10 hear. And they don't have to explicitly say it. All
02:21:56 11 they have to say is: There wasn't a knife in his hand,
02:21:59 12 and all of a sudden there was; I don't know what
02:22:01 13 happened, but Officer Edwards was the only one there.
02:22:03 14 It's the same thing as saying: Officer Edwards planted
02:22:06 15 the knife. I don't think they have to come out and say
02:22:08 16 it explicitly. That is their implication.

02:22:12 17 And it is, in our mind, certainly relevant
02:22:14 18 whether Mr. Mojarrad possessed a knife at the time of
02:22:17 19 the shooting. Again, this is the key issue in the case
02:22:25 20 in defendant's mind is: Did Mr. Mojarrad have a knife
02:22:29 21 at the time of the shooting?

02:22:32 22 THE COURT: So you don't envision that
02:22:33 23 there's a stipulation that could be crafted that would
02:22:38 24 remove this issue from the table?

02:22:41 25 MR. HARTZOG: I suppose if there's a

02:22:42 1 stipulation that Officer Edwards did not plant a knife
02:22:47 2 in his hand, that might work. I'd have to give that
02:22:51 3 little bit of thought. But I suppose I could go with a
02:22:54 4 stipulation that Officer Edwards did not put the knife
02:22:58 5 in his hand.

02:23:01 6 MS. BEIGHTOL: I don't think -- I don't think
02:23:05 7 we can make that stipulation.

02:23:07 8 But we can talk about all sorts of things
02:23:09 9 that the jury might jump to. Which comes back to if
02:23:14 10 these reports come in, it's very confusing and
02:23:17 11 misleading, as is leaving doors open about that. I
02:23:22 12 think what we have and what we can present to the jury
02:23:25 13 is the stuff that is real, which is two people didn't
02:23:29 14 see a knife, one person claims there was one, and
02:23:32 15 there's no video camera.

02:23:34 16 But even if, even if we have DNA evidence
02:23:39 17 come in without an expert -- which is, we've explained,
02:23:42 18 problematic -- you still have the problem that then
02:23:45 19 we're starting to enter testimony and thought process
02:23:49 20 about -- that doesn't exclude that he did or didn't have
02:23:53 21 the knife in his hand, because there are other
02:23:55 22 explanations for that.

02:23:57 23 And talking about Officer Thompson is not
02:23:59 24 helpful. He came up after the fact. There are two
02:24:01 25 witnesses other than Defendant Edwards that saw this.

02:24:05 1 Two. Mr. Caudle is a third person who saw it, but he
02:24:08 2 absolutely testified that he couldn't tell whether or
02:24:11 3 what was in his hand. So there are two. That's what
02:24:13 4 we're faced with. That's what we can talk about at
02:24:16 5 trial. And that's what the jury should, without video
02:24:19 6 of the event, look at. Because when you go into these
02:24:22 7 other areas, then there are -- there are all these cans
02:24:26 8 of worms that become open at that point where: Okay,
02:24:31 9 then we need to talk about there could be other reasons
02:24:33 10 that that's the case; where we've got two witnesses that
02:24:36 11 say it didn't happen, and one that does. And the jury
02:24:38 12 can do with that what they want. That's the search for
02:24:41 13 the truth that we'd like to present at trial.

02:24:47 14 If I may -- and I will stop talking after
02:24:49 15 this -- there is continued mention of this being a key
02:24:52 16 fact, key evidence, important evidence. If that were
02:24:55 17 the case, our client deserved to know that they were
02:24:58 18 going to enter it way back when through an expert.

02:25:08 19 MR. HARTZOG: And it was in our initial
02:25:11 20 disclosures the minute we got this report. We
02:25:14 21 identified it as an exhibit that we intended to use
02:25:16 22 along with an authenticating witness. Plaintiffs have
02:25:21 23 not objected on the grounds that it would take an expert
02:25:27 24 to authenticate this. They objected under 401, 402,
02:25:31 25 and 403. And under 403 I guess their argument is it's

02:25:34 1 misleading to the jury. But even if that's the case,
02:25:36 2 which I don't believe it is, even if it is, the
02:25:38 3 prejudicial value of it has to outweigh the probative
02:25:41 4 value of it. And that simply is not the case.

02:25:43 5 And I'm not surprised to hear they won't
02:25:46 6 stipulate that he didn't have a knife because clearly
02:25:48 7 they want the jury to take that implication. That has
02:25:51 8 been their case, that there was no knife, and all of a
02:25:56 9 sudden there was. The clear implication is that the
02:25:58 10 only person there who had the opportunity to do it,
02:26:00 11 Officer Edwards, planted the knife.

02:26:02 12 And they can say all day long: Oh, there's
02:26:05 13 a bunch of different explanations. None of them are in
02:26:08 14 any evidence.

02:26:09 15 The only person -- the two witnesses left
02:26:13 16 after they heard the first shots, Chad Caudle, who they
02:26:16 17 mentioned, said it looked like he had something in his
02:26:19 18 hand, but he couldn't tell. So there are three
02:26:22 19 witnesses. One couldn't tell, but he said when I got
02:26:25 20 up there, I saw the knife and realized that's probably
02:26:27 21 what I saw in his hand. But I think the clear
02:26:34 22 implication they want to give to the jury is this was
02:26:37 23 planted evidence, that it wasn't in his hands, then all
02:26:39 24 of a sudden it was. And the DNA evidence disproves
02:26:42 25 that. I think it is highly relevant and highly

02:26:45 1 probative, even if there is some risk to the jury of
02:26:48 2 confusion, which I don't believe there is. I believe
02:26:51 3 the report is pretty clear. But even if there is some
02:26:57 4 confusion about it, the probative value of this far
02:27:00 5 outweighs any risk of that.

02:27:03 6 THE COURT: So the timeline. Everybody gets
02:27:10 7 the report from the North Carolina State Crime Lab Crime
02:27:17 8 Laboratory. This State of North Carolina is looking to
02:27:22 9 know whether or not there's DNA on the knife.

02:27:28 10 And then -- and I think you all agree;
02:27:33 11 obviously that's what's going on, right? The State of
02:27:36 12 North Carolina is trying to figure out if there's DNA on
02:27:38 13 the knife?

02:27:39 14 MS. EDWARDS: Yes, Your Honor.

02:27:39 15 THE COURT: And the answer comes back:
02:27:41 16 Well, you know, we don't really know. Patel. It's
02:27:47 17 inconclusive.

02:27:49 18 MS. EDWARDS: Yes, Your Honor. And that
02:27:50 19 was actually known at the outset of the case because the
02:27:53 20 SBI file was available.

02:27:54 21 THE COURT: So when did you go to Dr. Foran?
02:28:02 22 Was that in response to some other action?

02:28:09 23 MS. EDWARDS: We went to Dr. Foran -- I
02:28:13 24 don't know exactly when, but maybe a month or two prior
02:28:16 25 to the expert disclosure deadline for the plaintiffs,

02:28:21 1 which was a bit before the defendant's deadline. We
02:28:23 2 disclosed him in that initial disclosure -- in that
02:28:30 3 initial, and then supplemented. But when we spoke with
02:28:33 4 him he said: I need the bench file from the State Crime
02:28:38 5 Lab. Which then we had to go through the process to
02:28:40 6 obtain.

02:28:41 7 THE COURT: So he's focused on the state's
02:28:43 8 materials. So when does Cybergeneitics get involved?

02:28:51 9 MR. HARTZOG: When plaintiff's counsel
02:28:53 10 called us and said: Our expert, Dr. Foran, has indicated
02:28:58 11 that there's additional testing that could be done, and
02:29:00 12 we are asking if you would consent to our motion to draw
02:29:04 13 his DNA.

02:29:06 14 THE COURT: Draw Edwards's DNA?

02:29:09 15 MR. HARTZOG: Edwards's DNA to test against
02:29:12 16 the knife.

02:29:12 17 THE COURT: And that results in the Bode
02:29:14 18 Technology report?

02:29:15 19 MR. HARTZOG: Correct. Which is -- and I
02:29:17 20 will say one more thing, Your Honor. Which is: In our
02:29:20 21 pretrial disclosures we did say the Cybergeneitics report
02:29:24 22 and supporting materials. So I think fairly the Bode
02:29:28 23 report falls under "supporting materials" and has been
02:29:30 24 identified.

02:29:31 25 THE COURT: So now we've got the Bode

02:29:34 1 report. So help me understand. So who goes to
02:29:38 2 Cybergenetics, you or you?

02:29:42 3 MR. HARTZOG: We did, Your Honor.

02:29:43 4 THE COURT: Because plaintiff said: Our
02:29:47 5 expert thinks more testing could be done?

02:29:50 6 MR. HARTZOG: Once we found out that more
02:29:51 7 evidence could be done and we got the DNA report, we --

02:29:55 8 THE COURT: Which plaintiff asked you to
02:29:56 9 get?

02:29:57 10 MR. HARTZOG: Correct.

02:29:57 11 THE COURT: For the purpose of you getting
02:30:00 12 more DNA evidence, or you?

02:30:03 13 MR. HARTZOG: It was for the purpose of
02:30:05 14 their expert requesting Officer Edwards's DNA. We said:
02:30:11 15 If he's going to test the DNA, we're also going to test
02:30:14 16 the DNA.

02:30:15 17 THE COURT: So Foran was going to use the
02:30:16 18 Bode report to consider further what the State of North
02:30:19 19 Carolina had done?

02:30:20 20 MR. HARTZOG: I think basically what the
02:30:22 21 State of North Carolina had done, the way they did the
02:30:24 22 testing, their system at the time was not sophisticated
02:30:30 23 enough. And there's things about peaks and spikes in
02:30:34 24 the DNA. They didn't have the technology to do the
02:30:37 25 full DNA testing that they now do. They do the

02:30:40 1 probabilistic testing like the TrueAllele testing.

02:30:44 2 THE COURT: What do you understand Foran was

02:30:46 3 going to do with the Bode report?

02:30:48 4 MR. HARTZOG: Well, we knew he was going to

02:30:51 5 run that DNA information and generate a report similar

02:30:54 6 to Cybergeneitics that we generated. We believed if

02:30:58 7 their expert is going to test the DNA, then ours should

02:31:02 8 too. So that's why we identified a rebuttal expert at

02:31:06 9 that time to do the same testing that their expert was

02:31:09 10 now going to be doing.

02:31:10 11 THE COURT: Okay. So really it's no

02:31:15 12 surprise to the plaintiff?

02:31:17 13 MR. HARTZOG: No.

02:31:29 14 THE COURT: I'm going to backtrack. And all

02:31:34 15 things considered, I'm going to let you bring in Clement

02:31:41 16 just for the purpose of explaining the Cybergeneitics

02:31:49 17 report.

02:31:54 18 MR. HARTZOG: Yes, Your Honor.

02:31:54 19 THE COURT: And if you want Foran to come

02:31:57 20 back and be your rebuttal witness, you certainly can.

02:32:05 21 MS. BEIGHTOL: Thank you, Your Honor.

02:32:09 22 THE COURT: And maybe you all can stipulate

02:32:12 23 and agree as to the authenticity of the Cybergeneitics

02:32:17 24 report such that Bracamontes doesn't have to come.

02:32:30 25 I'll leave that to you all, of course.

02:32:32 1 MR. HARTZOG: Thank you, Your Honor. We'll
02:32:34 2 talk.

02:32:35 3 THE COURT: I owe it to you to enter a
02:32:38 4 written order to explain my turn of view, and that
02:32:45 5 written order will follow. Okay.

02:32:48 6 MS. EDWARDS: Your Honor, we would request,
02:32:52 7 maybe an oral motion for leave to depose Ms. Clement.
02:32:55 8 Because we elected not to do that for the very reason
02:32:58 9 that she was rebuttal. And all of her opinions that
02:33:02 10 we've been exposed to at this point --

02:33:04 11 THE COURT: You're going to get that chance.
02:33:05 12 And so where is she in your order of proof?
02:33:11 13 MR. HARTZOG: Your Honor, frankly, we're
02:33:13 14 still working on our order of proof. But she would be
02:33:16 15 probably somewhere near the -- probably near the end,
02:33:22 16 but that's subject to change.

02:33:24 17 THE COURT: Well, remember there's that day
02:33:26 18 I told you we would end early, just thinking about
02:33:31 19 trying to help with the economies. Wasn't that the
02:33:35 20 second day of the trial, that Tuesday? I've left my
02:33:42 21 calendar. I told you over the phone.

02:33:44 22 MR. HARTZOG: That's what I wrote down.

02:33:46 23 THE COURT: Is that something you'd be
02:33:47 24 interested in, them bringing her to New Bern? When do
02:33:50 25 you want to depose her?

02:33:52 1 MS. BEIGHTOL: I mean, I think ideally we
02:33:54 2 would depose her before that because we'd like to
02:33:59 3 prepare Dr. Foran, who we advised -- I mean, we hope
02:34:03 4 he's still available, because we advised him he wasn't a
02:34:03 5 witness anymore. I mean, we have a lot of backtracking
02:34:06 6 to do.

02:34:07 7 THE COURT: Do you want to go make a phone
02:34:08 8 call right now, one of you, and we'll keep on going?
02:34:15 9 I'm just wanting to help you.

02:34:16 10 MS. EDWARDS: Your Honor, I don't think
02:34:18 11 that's going to make much of a difference to do it now
02:34:21 12 versus in a few hours.

02:34:22 13 THE COURT: Well, when can you make Clement
02:34:25 14 available?

02:34:25 15 MR. HARTZOG: I will check her schedule, but
02:34:27 16 if we do a remote deposition, we can do it probably just
02:34:30 17 about any time.

02:34:31 18 MS. EDWARDS: That will be fine with us.

02:34:33 19 THE COURT: Your oral motion is allowed
02:34:36 20 regarding the deposition.

02:34:38 21 And if you want to add any other contours to
02:34:43 22 that allowance of that motion --

02:34:47 23 MS. BEIGHTOL: I mean, I think we'd like it
02:34:49 24 in enough time that we'd be able to provide it to Dr.
02:34:52 25 Foran and prepare our case for trial. I mean, we're

02:34:55 1 three weeks before trial right now, and this is
02:34:58 2 obviously really impinging on our entire case that we
02:35:02 3 have to present day one.

02:35:15 4 THE COURT: So to mitigate any prejudice, do
02:35:18 5 you want to discuss pushing the trial out a little bit,
02:35:23 6 which is something that I could consider to alleviate
02:35:30 7 some of your concern.

02:35:34 8 MS. BEIGHTOL: Unfortunately that may cause
02:35:37 9 us problems with other witnesses, of which there are not
02:35:40 10 one or two, but multiple. I mean I think at this point
02:35:45 11 this just puts us in a bind no matter what.

02:35:48 12 But we would like to get an opportunity -- I
02:35:50 13 mean, we both have things the next two days, but we'd
02:35:55 14 like within the next seven to ten days to have her
02:35:59 15 availability. And we're fine doing it remote. But
02:36:03 16 usually court reporters take two weeks to get
02:36:05 17 depositions back. We'd have to order an expedited
02:36:09 18 deposition transcript. There are lots of things that
02:36:11 19 come into play here that will prejudice the plaintiff at
02:36:14 20 this moment in time in the case.

02:36:18 21 THE COURT: So you need to get her as soon
02:36:20 22 as possible.

02:36:21 23 MR. HARTZOG: Your Honor, I've already
02:36:22 24 emailed her to ask her for her availabilities.

02:36:25 25 THE COURT: If she emails you back,

02:36:28 1 interrupt me, and we'll focus on that.

02:36:30 2 MS. EDWARDS: Your Honor, may I, for
02:36:31 3 clarification? You're allowing Ms. Clement to testify
02:36:35 4 but for limited purposes?

02:36:39 5 THE COURT: Well, obviously she doesn't need
02:36:41 6 to talk about Foran if he's putting in the case in
02:36:48 7 chief, right? Well, let's think it through. Foran may
02:36:56 8 or may not come as your rebuttal witness. So much of
02:36:59 9 the thrust of her opinions are how wrong Foran is. So
02:37:06 10 how much are you going to want to go into that?

02:37:10 11 MR. HARTZOG: Well, if Foran is not
02:37:12 12 testifying -- that's up to them, but if he's not
02:37:14 13 testifying, that does cabin her opinions somewhat.

02:37:18 14 THE COURT: I think you need focus -- she's
02:37:20 15 your witness to paragraph 17.

02:37:23 16 MR. HARTZOG: Correct, Your Honor. That's
02:37:24 17 really what we want her in for is to say: Here's the
02:37:27 18 Cybergeneitics report. Here's how it's done. And here's
02:37:30 19 what it is; here's what it means. And that's pretty
02:37:33 20 much the extent of what we need from her.

02:37:35 21 THE COURT: Yeah. I would say in his case
02:37:38 22 in chief he's got to steer clear of eliciting any attack
02:37:42 23 from her of Foran. Now, that's not to say if you
02:37:45 24 decide to put Foran on, that she couldn't be recalled
02:37:50 25 subject to the rules.

02:37:53 1 MS. BEIGHTOL: Your Honor, just thinking
02:37:55 2 through this, and all the logistical hassles, and what I
02:37:58 3 fear and we fear, and one reason we made this motion is
02:38:02 4 the waste of time that will be practiced upon the Court.
02:38:06 5 We would be willing to try to strike a compromise such
02:38:09 6 as letting the pages in that you were discussing
02:38:13 7 beforehand, before our lunch break, of the report; I
02:38:19 8 think it was 1, 2, 3, and 5, and having that come in
02:38:23 9 versus Clement in some manner. Look, we want to be
02:38:28 10 fair to all parties involved. We're not trying -- but
02:38:31 11 we don't want this to turn into gamesmanship that
02:38:35 12 creates a delay in trial. We don't want hardships
02:38:38 13 placed on the Court or placed on the parties. So we're
02:38:41 14 open to discussions in that regard, if it can alleviate
02:38:45 15 some of these hassles. Because this is a lot that
02:38:48 16 could delay the trial in its current stead.

02:38:53 17 THE COURT: The shapes keep shifting. So
02:38:58 18 now they would consent to 1, 2, 3, and 5 of the
02:39:01 19 Cybergeneitics report introduced into evidence with or --
02:39:05 20 maybe they don't even need the -- are you --

02:39:10 21 MR. HARTZOG: Well, Your Honor, I do think
02:39:11 22 Meghan Clement having some explanation to the jury,
02:39:14 23 here's what this is and here's what it means, would be
02:39:17 24 helpful. And that is going to be the extent of her
02:39:19 25 opinion. And that's an opinion that's been known to

02:39:23 1 plaintiff's counsel since March of 2022, which hasn't
02:39:29 2 changed. It's written in her report. All it is is:
02:39:32 3 Here's the Cybergeneitics report; here's how we do the
02:39:34 4 testing, and here's what it means.

02:39:36 5 THE COURT: You were sloppy in the way that
02:39:39 6 you put out Clement. But the plaintiff has known all
02:39:44 7 along that this was your position, that you would take
02:39:52 8 this position, and you had someone qualified or --
02:39:59 9 maybe -- to illuminate what the Cybergeneitics report
02:40:04 10 means. And I think you should be able to still,
02:40:11 11 despite your sloppiness, all things considered, bring
02:40:14 12 her into the courtroom.

02:40:17 13 So if you're not willing to stipulate to
02:40:20 14 that, I'm not going to make you stipulate to that. But
02:40:25 15 I'm going to say: Focus your witness on what you wanted
02:40:32 16 to draw from her in support of her opinion in paragraph
02:40:37 17 17.

02:40:40 18 MR. HARTZOG: Understood, Your Honor.

02:40:43 19 THE COURT: And then if plaintiff wants to
02:40:45 20 bring Foran in, plaintiff can in rebuttal. Or if
02:40:53 21 plaintiff wants to present Foran in its case in chief,
02:40:57 22 it can, and take the first stab at it.

02:41:04 23 But I think I can control your presentations
02:41:09 24 in a way to minimize the prejudice and any perceived
02:41:14 25 waste of time. And so I'll be mindful of the

02:41:23 1 plaintiff's concerns in that regard.

02:41:28 2 MR. HARTZOG: Understood, Your Honor. We
02:41:29 3 will keep her testimony very limited.

02:41:31 4 MS. BEIGHTOL: I'm just trying to put another
02:41:34 5 opportunity out there for maybe this to become a little
02:41:36 6 more streamlined.

02:41:37 7 THE COURT: Do you want to talk about that
02:41:38 8 outside my presence, and just if you all come to some
02:41:42 9 agreement, or are you advocating for your client and
02:41:44 10 seeking a ruling from me?

02:41:46 11 MS. BEIGHTOL: I think we're just trying to
02:41:47 12 make this streamlined for the Court and everyone else in
02:41:50 13 a manner that doesn't require multiple depositions and
02:41:54 14 back and forth and, frankly, Your Honor's careful
02:42:00 15 criticism, look at this expert and maybe find a way to
02:42:04 16 get around that.

02:42:05 17 And I have not talked to anyone about this
02:42:07 18 but me, so my law partner may jump in and tell me to be
02:42:12 19 quiet. But what if there was some sort of stipulation
02:42:15 20 we could get both of the experts to agree on, plus the
02:42:19 21 four pages of the report, so that this does not have to
02:42:23 22 be -- because I fear, like I said, that it's going to
02:42:26 23 turn into not only a game, but that it's going to be
02:42:29 24 very confusing if we're case and chiefing it on his case
02:42:33 25 in this limited fashion, and then potentially bringing

02:42:36 1 someone else in, and the only opinions we've been aware
02:42:39 2 of are literally paragraphs that criticize the guy we're
02:42:43 3 bringing in last. It's just very back-ended. And
02:42:46 4 perhaps a stipulation of some kind that the parties
02:42:48 5 could work out could get around this to not delay and to
02:42:53 6 not burden the Court and to instead burden the parties.
02:42:59 7 Whoever's fault it is should have had this straight
02:43:02 8 before now.

02:43:03 9 THE COURT: Did you want to respond to that?

02:43:06 10 MR. HARTZOG: I'll be happy to talk to them
02:43:08 11 after court today.

02:43:10 12 THE COURT: Okay. Well, let's keep on
02:43:12 13 going.

02:43:24 14 Any disputes regarding video depositions
02:43:27 15 that I need to know about?

02:43:31 16 MS. BEIGHTOL: Yes, Your Honor. The parties
02:43:35 17 jointly filed a notice of dispute at docket 178.

02:43:43 18 THE COURT: Let me go to that.

02:43:44 19 MS. BEIGHTOL: Your Honor will be pleased to
02:43:46 20 know we streamlined those to those that relate to
02:43:49 21 motions in limine, but there are a limited few that are
02:43:51 22 outside of that. And you can see the summary of the two
02:43:57 23 categories on page 2 and 3 of docket 178, which the
02:44:01 24 parties worked together to put together.

02:45:07 25 THE COURT: So what's the most efficient way

02:45:10 1 to focus on category 2? What do you think?

02:45:15 2 MS. BEIGHTOL: I think we can go by topic,

02:45:18 3 probably. And, you know, some of these somewhat

02:45:21 4 dovetail with the motion in limine, so I don't know if

02:45:24 5 it's more effective and efficient --

02:45:26 6 THE COURT: Do that first?

02:45:28 7 MS. BEIGHTOL: -- to do those first. And

02:45:29 8 then whatever is sort of left over, then maybe that gets

02:45:33 9 dealt with in this section. Because I think some of

02:45:35 10 your rulings will give us an understanding of where

02:45:39 11 things may fall in these five categories.

02:45:42 12 THE COURT: Okay. So what does evidence

02:46:16 13 about Soheil's character and mental health history do

02:46:19 14 for you? Why do you want that in?

02:46:21 15 MR. HARTZOG: Well, Your Honor, it's partly

02:46:23 16 for a damages perspective. As plaintiff indicated in

02:46:27 17 their pretrial filings, in fact, in their jury

02:46:30 18 instructions they say that you can consider the

02:46:33 19 relationship between the family and Soheil. And in

02:46:38 20 part these medical records and prior issues that Soheil

02:46:43 21 had establish that his own family had had him

02:46:48 22 involuntarily committed on numerous occasions, had

02:46:52 23 kicked him out of the house for violence, was worried

02:46:56 24 about him harming their other child. I think all of

02:47:01 25 that information and evidence comes in on the issue of

02:47:06 1 damages.

02:47:10 2 THE COURT: Okay. About his character?

02:47:15 3 Where does character start and stop?

02:47:21 4 MR. HARTZOG: Well, Your Honor, we've tried
02:47:23 5 to be mindful of not going too far afield and only
02:47:27 6 chosen ones that we think show -- that characterize
02:47:36 7 damage to the family and relationship with his family
02:47:40 8 and sort of his overall demeanor. It also is kind of
02:47:46 9 rebuttal evidence -- which I know we don't need to
02:47:49 10 disclose, but we did, in an abundance of caution -- to
02:47:53 11 any testimony that Soheil would not have done this; he
02:47:56 12 would not have attacked Officer Edwards; he's not a
02:48:01 13 violent person; he would not be the type of person to
02:48:04 14 hold a knife like that, where we have evidence that, in
02:48:08 15 fact, he has done that in the past. So I think it's
02:48:12 16 both rebuttal evidence and it's evidence on damages with
02:48:18 17 respect to issues he's had previously with his family.

02:48:21 18 THE COURT: Okay.

02:48:22 19 MS. BEIGHTOL: Your Honor, I think -- if I
02:48:24 20 may, this is an issue very personal to me. I do a lot
02:48:28 21 of medical malpractice, and I'm very protective of the
02:48:31 22 patient's, even if they're deceased, mental health
02:48:34 23 records, especially in today's environment. This is
02:48:38 24 not that that he just shared.

02:48:41 25 Let us be clear what we're talking about.

02:48:44 1 They have identified 79 sets of medical records from
02:48:49 2 this young man. They have identified three of his
02:48:53 3 mental health care providers as "will call," 19 as "may
02:48:59 4 call." This case -- I mean, they've talked about a lot
02:49:02 5 of what we may say at trial. But I can tell you from
02:49:05 6 this pretrial order you can look at, almost half of it
02:49:09 7 is involuntary commitments and medical records for this
02:49:13 8 young man who unfortunately had a mental health issue.
02:49:17 9 But as Your Honor well knows from the rulings you've
02:49:20 10 made so far in this case, that has absolutely no
02:49:23 11 bearing, absolutely no bearing on an excessive force
02:49:27 12 claim.

02:49:28 13 In fact, entry of such information, as other
02:49:31 14 courts -- and we've got it in our briefing -- have held,
02:49:34 15 is unduly prejudicial because the test is evaluated from
02:49:39 16 an objective reasonableness based on the information the
02:49:42 17 officer knew at the time.

02:49:44 18 This officer, Defendant Edwards, has
02:49:47 19 testified unequivocally he never met with, never dealt
02:49:53 20 with, never spoke to, never saw, didn't even know the
02:49:57 21 name of Soheil at the time he shot him.

02:50:01 22 Entering this evidence will confuse and
02:50:03 23 mislead this jury into thinking exactly what he just
02:50:07 24 said he wanted to enter the evidence for, that he acted
02:50:11 25 in conformity with. That is not appropriate under 404;

02:50:14 1 it is not appropriate under excessive force. It is
02:50:18 2 absolutely irrelevant.

02:50:20 3 And let's talk about damages. He's
02:50:22 4 mentioned damages. As it relates to damages, exactly
02:50:27 5 what he said is true: His relationship with his family;
02:50:33 6 that's what is important here.

02:50:40 7 Does his involuntary commitment, does his
02:50:43 8 mental health on a particular day, does whether or not
02:50:45 9 he had sufficient medication at a sufficient time,
02:50:47 10 whether he had anxiety, whether he had paranoia, does
02:50:51 11 that -- what matters is his relationship to this family.

02:50:55 12 I see this a little different than some
02:50:57 13 people may because I practice both in Georgia and in
02:50:59 14 North Carolina. In Georgia the standard is backwards
02:51:03 15 to North Carolina. Here in North Carolina we look at
02:51:06 16 the loss of a person to their family. In Georgia you
02:51:11 17 look at the loss of the person's life to the person who
02:51:14 18 lost the life. And I think that's really instructive
02:51:18 19 here because when we think about the loss of someone to
02:51:20 20 their family member, it's not how many times they've
02:51:23 21 been committed; it's the relationship they have with
02:51:26 22 their family member.

02:51:28 23 I don't think most of us sitting here today
02:51:31 24 know the mental health diagnoses of our family members
02:51:36 25 or the mental health diagnoses of our friends. And a

02:51:40 1 great example of that is Soheil's brother. He doesn't
02:51:44 2 know about the same instances that, per se, his mother
02:51:47 3 does or his father does. We don't love or care about
02:51:51 4 people because of their diagnoses. It's their
02:51:54 5 relationship to us. And that is what the law permits
02:51:56 6 to come in.

02:51:58 7 A stray from that is absolutely prejudicial
02:52:01 8 in a case where on liability that is not looked at.
02:52:04 9 How do you teach a jury not to look at that when it's
02:52:08 10 not relevant?

02:52:12 11 There are other courts that have looked at
02:52:14 12 this issue, and they have found the way we think this
02:52:17 13 Court should find and we think would be appropriate to
02:52:19 14 keep us on the issues that are important. And they
02:52:22 15 talk about -- here's one case that's instructive. They
02:52:28 16 wanted to enter this evidence on the issue of
02:52:30 17 credibility, something the person said in their medical
02:52:33 18 records as to credibility. This is the Northern
02:52:35 19 District of New York; it's the Harris v. Donahue case,
02:52:38 20 2017_WL_3638452. Unfortunately I put the type on my
02:52:47 21 outline a little bit smaller than I can read. I
02:52:50 22 apologize.

02:52:51 23 But what they were concerned about, what the
02:52:53 24 Court was really concerned about in that excessive force
02:52:56 25 case was that it might go to propensity to engage in the

02:53:01 1 type of activity engaged in. The Court was very worried
02:53:05 2 about that. And so it didn't let it in for that
02:53:07 3 reason. And it also was concerned about the volume and
02:53:10 4 the consumption of time, and only let in specific
02:53:16 5 statements that specifically went to credibility, and
02:53:18 6 that was it. There is not one specific statement in
02:53:21 7 these medical records that is going to tell you the
02:53:23 8 relationship at the time of Soheil's passing with his
02:53:26 9 mother and father.

02:53:28 10 THE COURT: Okay. Is there anything about
02:53:30 11 his mental health diagnosis that you think should come
02:53:33 12 in?

02:53:35 13 MS. BEIGHTOL: No.

02:53:36 14 THE COURT: Nothing?

02:53:37 15 MS. BEIGHTOL: I mean, I think as it relates
02:53:39 16 to his mental health diagnoses, the thing that -- as far
02:53:42 17 as his relationship to his family, if a family member
02:53:46 18 says: Yes, this is -- but that's not the testimony in
02:53:49 19 this case. Certainly he was committed. And those may
02:53:53 20 have been times that the family was not together. But
02:53:55 21 that does not bear on his relationship to them as
02:53:59 22 people, as humans.

02:54:00 23 I have a parent in another state across the
02:54:03 24 country. I don't have a lesser relationship with him
02:54:05 25 because he's in California and I'm in Raleigh. We talk

02:54:09 1 twice a day half the time, not always, but --

02:54:12 2 THE COURT: Is there anything the records

02:54:14 3 about a physical health diagnosis that you think should

02:54:17 4 come in?

02:54:18 5 MS. BEIGHTOL: Not about physical health.

02:54:20 6 And there's no allegation from -- I should have said

02:54:22 7 this earlier, and I apologize for not bringing this to

02:54:25 8 the Court's attention. But Edwards himself testified

02:54:29 9 very cleanly. He could tell something was wrong with

02:54:33 10 Soheil, but he did not know or diagnose or determine at

02:54:36 11 that time it was mental health. And because he did

02:54:39 12 not, that takes it out of the realm of anything that

02:54:43 13 should be discussed in this case. Because unless he

02:54:46 14 perceived it to be mental health, unless he knew of a

02:54:49 15 mental health concern at that moment, it's not relevant.

02:54:51 16 And, in fact, not only is it not relevant, as the New

02:54:55 17 York Court mentioned, it could cause the jury to make a

02:54:59 18 decision based on that when it shouldn't be

02:55:02 19 understanding it at all.

02:55:09 20 THE COURT: And tell me why you see it

02:55:11 21 differently.

02:55:12 22 MR. HARTZOG: Well, Your Honor, again, we're

02:55:13 23 not introducing it for the purposes of saying Officer

02:55:16 24 Edwards knew this and acted in accordance with his

02:55:18 25 knowledge. That's not why we're introducing it.

02:55:21 1 We're introducing it for damages -- from a damages
02:55:25 2 perspective because, as plaintiff said, it's the
02:55:28 3 relationship with his family. And they get to talk
02:55:30 4 about that. And if they're going to talk about the
02:55:33 5 relationship that he had with his family, then I think
02:55:35 6 we should be able to use that as cross-examination
02:55:38 7 material and say: Well, you've had him committed. You
02:55:44 8 knew he had mental health issues; he attacked you; he
02:55:47 9 attacked your family member, and you didn't -- you
02:55:50 10 kicked him out of the house because he was violent
02:55:52 11 towards you. I think that --
02:55:55 12 THE COURT: Kicked him out of the house;
02:55:56 13 that's not a mental health issue. That's a --
02:55:56 14 MR. HARTZOG: Correct.
02:56:02 15 THE COURT: -- is it true that you --
02:56:03 16 MR. HARTZOG: Correct. And some of that is
02:56:04 17 rebuttal. I understand that.
02:56:06 18 But the mental health records have that type
02:56:09 19 of information in it.
02:56:11 20 THE COURT: You could ask the witness: Is
02:56:12 21 it true you committed him?
02:56:15 22 MR. HARTZOG: Right. But without knowing
02:56:17 23 why, I think it's.
02:56:18 24 THE COURT: Why did you commit him?
02:56:21 25 And the witness would answer that question.

02:56:24 1 MR. HARTZOG: Well, presumably, but that's
02:56:27 2 what they're trying to keep out.

02:56:28 3 THE COURT: But that's different from
02:56:29 4 medical records, isn't it? This is asking a witness
02:56:33 5 about an event.

02:56:35 6 MR. HARTZOG: I suppose if I asked them
02:56:36 7 about the event, if they say: I don't remember that,
02:56:39 8 would I be able to use that record to refresh their
02:56:42 9 recollection or to impeach them?

02:56:45 10 I think these records are relevant for what
02:56:49 11 was his relationship with his family? Because that's
02:56:52 12 what they're going to be introducing at trial.

02:56:55 13 THE COURT: It seems like it's a couple of
02:56:57 14 steps removed. What a doctor diagnoses somebody with
02:57:01 15 isn't necessarily an explanation of a relationship
02:57:07 16 between a child and a parent, right?

02:57:10 17 MR. HARTZOG: I suppose in some sense that
02:57:12 18 is correct. But the parents were the ones bringing him
02:57:17 19 in saying he attacked a family member or he was violent.
02:57:22 20 And I think that's what's contained in the medical
02:57:26 21 records is their statements about what he did. So I
02:57:29 22 think --

02:57:29 23 THE COURT: Is there a hearsay something or
02:57:32 24 other then if you're trying to get their statements in
02:57:37 25 through what a doctor writes down that maybe comes out

02:57:42 1 of an admission report that the doctor wasn't even
02:57:46 2 around to directly receive?

02:57:49 3 MR. HARTZOG: Well, I think a statement made
02:57:50 4 for the purpose of receiving medical care --

02:57:53 5 THE COURT: But it's not the person
02:57:54 6 receiving the medical care. It's the parent thrusting
02:57:57 7 the medical care onto the child.

02:58:00 8 MR. HARTZOG: Well, but -- they're the ones
02:58:04 9 who presumably will come in and testify that they had a
02:58:06 10 good relationship. And I think we have the right to use
02:58:10 11 that as --

02:58:12 12 THE COURT: I think you've got the right to
02:58:14 13 ask the witness when they describe a placid, serene,
02:58:19 14 non-turbulent relationship. You've got a question, it
02:58:25 15 sounds like, you want to ask, which is: Well, isn't it
02:58:27 16 true that he attacked you?

02:58:31 17 Well, yes.

02:58:32 18 And isn't it true that you committed him or
02:58:36 19 sought to have him committed?

02:58:37 20 Yes.

02:58:39 21 And then you kind of -- I don't see where
02:58:41 22 the medical records come in.

02:58:44 23 MR. HARTZOG: I suppose they would only come
02:58:45 24 in at that point, Your Honor, if they denied that that
02:58:48 25 ever happened. Then I would use that for impeachment

02:58:53 1 purposes.

02:58:53 2 THE COURT: We'll have to see what happens,
02:58:54 3 won't we? I don't want to get too far down the road.

02:58:57 4 But that's a preview.

02:59:00 5 Do you have anything to say?

02:59:01 6 MS. BEIGHTOL: I would just say that it's a
02:59:03 7 very slippery slope, Your Honor, because, again, first
02:59:07 8 of all, it can't be entered that he acted in conformity
02:59:11 9 therewith under 404. And in addition, a conversation
02:59:17 10 with the parents that slides into mental health issues
02:59:20 11 that Defendant Edwards was not aware of at the time,
02:59:23 12 it's got to be very clear to this jury.

02:59:27 13 And I am concerned that this is not
02:59:29 14 something that a layperson can fully understand when
02:59:32 15 they're being presented evidence about a young man and
02:59:36 16 mental health concerns when the defendant himself was
02:59:40 17 not aware of those in the seconds at issue that he saw
02:59:46 18 this man for the first time.

02:59:49 19 THE COURT: Have you proposed a limiting
02:59:50 20 instruction to me? Because I'm giving you the chance
02:59:53 21 to do that.

02:59:55 22 MS. BEIGHTOL: I think we can talk about a
02:59:57 23 limiting instruction, certainly. I still have the
02:59:59 24 concern, but we can certainly look into that.

03:00:01 25 THE COURT: Without waiving your objection,

03:00:04 1 if you want to present a limiting instruction, because
03:00:08 2 depending on what that witness testifies to on direct,
03:00:14 3 I've indicated that I see that it could be proper for
03:00:24 4 defense counsel to ask some questions directly relating
03:00:29 5 to that person's relationship with their son, but only
03:00:33 6 for the purpose of damages. And I would want to make
03:00:37 7 that clear to the jury.

03:00:39 8 Now, maybe I made a mistake in not
03:00:42 9 bifurcating this case. But that's a double edged
03:00:47 10 sword. But you did make a motion to where you sought
03:00:50 11 to have the punitive damages phase done separately, and
03:00:53 12 I said no. So I'm trying to strike a balance here.

03:00:59 13 MS. BEIGHTOL: As far as your ruling, Your
03:01:01 14 Honor, I want to understand where you're going to order
03:01:05 15 and where the limiting instruction would come in. I
03:01:07 16 mean, I guess my concern is: Medical record, you know,
03:01:11 17 if you showed any family member of mine my medical
03:01:15 18 records, they're not going to have seen it before.
03:01:17 19 That would be for a doctor to talk about. So on
03:01:19 20 impeachment it would need to be a more specific instance
03:01:23 21 that they either know or not know about. I want to be
03:01:26 22 clear what the Court is ordering.

03:01:27 23 THE COURT: I think you ought to take a stab
03:01:29 24 at drafting, without waiving your objection, what would
03:01:34 25 be acceptable to you when the testimony turns on

03:01:40 1 cross-examination, say, of the mother, and defense
03:01:47 2 counsel has the opportunity to inquire whether or not
03:01:54 3 she was attacked by him or whether or not she committed
03:01:59 4 him.

03:02:00 5 And I would want it plain to the jury that
03:02:03 6 this is not to be considered by you -- and I'll be
03:02:06 7 working on this, too, in my instructions -- this is not
03:02:10 8 to be considered by you as to whether or not he acted in
03:02:14 9 conformity; rather, this is solely for the purpose of
03:02:22 10 should you find liability on the part of the defendant,
03:02:29 11 assessing the damages accruing from his death.

03:02:43 12 Something like that. You'll improve on that, I'm sure.

03:02:46 13 But I don't see any need for medical records
03:02:49 14 or mental health records of this type to come in unless
03:02:55 15 your witness on the stand says: I never committed him;
03:02:59 16 I never felt concerned enough about my safety to tell
03:03:08 17 him that he had to seek treatment, or, you know. And
03:03:18 18 then maybe some medical or mental health records of a
03:03:21 19 particular date and time redacted in some way might be
03:03:28 20 allowed to be introduced to impeach. But we're
03:03:32 21 certainly not there yet.

03:03:33 22 MS. BEIGHTOL: In other words, that that
03:03:35 23 would only come in for impeachment purposes. And as it
03:03:38 24 relates to the treating health care providers that
03:03:41 25 they've identified, I assume that we're talking about

03:03:43 1 that altogether; I assume those would also be excluded
03:03:46 2 likewise?

03:03:47 3 THE COURT: Yes. Unless there's something
03:03:49 4 that I'm not seeing here. I just don't see it as
03:03:53 5 anything other than impeachment.

03:03:56 6 MS. BEIGHTOL: And so it would be denied for
03:03:59 7 those three motions -- I'm sorry, it sounds like granted
03:04:04 8 for motions 1, 2, and 3 with the caveat -- that the
03:04:06 9 plaintiff's motion in limine is granted, 1, 2, and 3,
03:04:09 10 with the caveat that you are reserving the right to
03:04:13 11 permit it on impeachment with plaintiffs, and you will
03:04:17 12 consider an instruction proposed by plaintiff related to
03:04:21 13 that?

03:04:21 14 THE COURT: I would always consider any
03:04:22 15 instruction about anything so long as it's timely. And
03:04:26 16 I'm opening up the door to both sides, based on what
03:04:29 17 happens today, to supplement your jury instructions with
03:04:34 18 limiting instructions.

03:04:35 19 And I probably won't go so far as to just --
03:04:39 20 I would just say reserve ruling with respect to any
03:04:42 21 attempt to introduce a medical or mental health record
03:04:50 22 for an impeachment purpose. I'm not saying it's going
03:04:53 23 to be okay. I'm saying that that's the only door that's
03:04:56 24 open, unless defendant can show me something very
03:05:01 25 compelling, that that is the only door open to the

03:05:06 1 defendant right now would be impeachment.

03:05:09 2 MS. BEIGHTOL: And would that go -- that same
03:05:11 3 ruling go for 1, 2, 3, and then 4, which is the prior
03:05:15 4 bad acts motion by plaintiff?

03:05:17 5 THE COURT: Prior bad acts. What do you
03:05:20 6 want to say about prior bad acts?

03:05:23 7 MR. HARTZOG: Your Honor, I think the issue
03:05:28 8 is going to be, again, impeachment. Plaintiff himself
03:05:33 9 has testified that Soheil was not a violent person, that
03:05:37 10 he wouldn't do something like this. He's quoted in
03:05:41 11 news sources saying the same thing. And we have
03:05:45 12 evidence that that is not the case. So I think we
03:05:49 13 should be permitted to use those prior incidents as
03:05:53 14 impeachment material on the testimony that has
03:05:57 15 previously been given that he would not have done this
03:06:05 16 or that he was not a violent person.

03:06:08 17 MS. EDWARDS: Your Honor, that is the exact
03:06:10 18 thing that is prohibited by Rule 404. Impeachment is
03:06:14 19 for the purpose of showing that a witness is not
03:06:16 20 credible. So unless there's an attack on the knowledge
03:06:22 21 and truthfulness of the witness -- for example, Siavash
03:06:27 22 Mojarrad, who is the plaintiff in this case, testified
03:06:29 23 at his deposition, was asked repeatedly about a number
03:06:32 24 of incidents that he didn't know about because he was
03:06:34 25 living in California. So the concept that he could

03:06:36 1 say: I didn't know about this; no, I don't know what
03:06:40 2 you're talking about; my brother was a peaceful, nice
03:06:43 3 guy.

03:06:43 4 Did you ever get into arguments?

03:06:45 5 Yes, we did, of course. We're brothers. We
03:06:46 6 got into arguments. We had physical fights growing up.
03:06:49 7 That's what brothers do.

03:06:50 8 I have two boys myself, so I'm very familiar
03:06:53 9 with that.

03:06:54 10 The concept that the defendant could then
03:07:00 11 introduce any evidence of violence to contradict that,
03:07:03 12 that's not permissible, because he didn't know about
03:07:05 13 that evidence. So if you can prove he knew about that
03:07:08 14 evidence, that's one thing. That's impeachment. But
03:07:10 15 if you're not able to show that he knew about it, then
03:07:13 16 he's not being impeached; you're just trying to use a
03:07:16 17 back door to introduce the evidence for impermissible
03:07:19 18 purposes.

03:07:21 19 THE COURT: What's your answer?

03:07:22 20 MR. HARTZOG: Well, this is not an isolated
03:07:24 21 incident. There are multiple incidents of violence by
03:07:30 22 the decedent in this case.

03:07:32 23 And I think it also goes to family
03:07:34 24 relations. If he was not aware of this, I think we
03:07:39 25 have the right to say: So you weren't aware that he was

03:07:41 1 doing all these things? You didn't spend time with
03:07:44 2 him? You weren't with him? And I think that goes,
03:07:47 3 again, to damages and impeachment.

03:07:50 4 THE COURT: I don't think this particular
03:07:52 5 circumstance goes so much to damages that the prejudice
03:07:57 6 to the plaintiff is outweighed by the evidence for the
03:08:13 7 purpose you're seeking. I think that's a stretch. I
03:08:18 8 think the prejudice side of the scale tips as far as
03:08:24 9 other outbursts not directed to family members but to
03:08:30 10 law enforcement. And that was affecting someone's
03:08:35 11 relationship? I just don't get that. So I think
03:08:39 12 that's a stretch.

03:08:41 13 MR. HARTZOG: So just so I'm clear, we are
03:08:44 14 permitted to use incidents where his own family was
03:08:47 15 involve and was aware of the incident, but other
03:08:49 16 incidents would not come in?

03:08:52 17 THE COURT: All right. You're now saying
03:08:54 18 if the family knew about something that had happened
03:08:57 19 with law enforcement?

03:08:58 20 MR. HARTZOG: If we can establish that the
03:09:00 21 family knew about it.

03:09:01 22 THE COURT: I don't think so.

03:09:03 23 MR. HARTZOG: Okay.

03:09:06 24 THE COURT: But if it's something this
03:09:08 25 defendant did to his family directly, that's another

03:09:14 1 thing. But I just think the prejudice to the plaintiff
03:09:21 2 of the effort to establish in front of the jury that the
03:09:26 3 particular witness knew about something that happened in
03:09:29 4 a totally different circumstance, that, in and of
03:09:35 5 itself, is concerning to me.

03:09:36 6 And then the fact that it would have
03:09:38 7 happened to law enforcement suggests that it's being
03:09:43 8 offered to show the plaintiff had this propensity or
03:09:50 9 character. And I understand that to be the type of
03:09:53 10 evidence this rule is meant to exclude.

03:09:57 11 But do you have some case law other than
03:09:59 12 what has been noted or some other argument?

03:10:04 13 MR. HARTZOG: Again, Your Honor, we intend
03:10:07 14 to use it primarily as impeachment and damages evidence.

03:10:10 15 THE COURT: Well, you trod carefully if you
03:10:15 16 think it's impeachment. If an outburst unrelated to a
03:10:19 17 witness, as between the plaintiff and law enforcement,
03:10:22 18 you'd better call me out into the hall or at sidebar if
03:10:27 19 you really think it needs to come in.

03:10:30 20 MR. HARTZOG: Understood, Your Honor.

03:10:32 21 MS. EDWARDS: Your Honor, may I ask for a
03:10:33 22 piece of clarification on that? Because there are a
03:10:36 23 couple of instances in which Soheil Mojarrad
03:10:42 24 unfortunately did harm to himself. It includes an
03:10:49 25 incident where he was self-harming and an incident

03:10:55 1 where, although it's unclear, he had an overdose on
03:11:00 2 medication. It's unclear whether it was intentional.
03:11:03 3 There was an incident where he set fire to his own car.
03:11:06 4 Are those the types of prior acts that, because they
03:11:09 5 don't have a bearing on the relationship with his
03:11:11 6 family, are also excluded?

03:11:19 7 THE COURT: Do you want to be heard on those
03:11:20 8 three specific incidences?

03:11:27 9 MR. HARTZOG: Your Honor, I will just say
03:11:29 10 that in our brief we cited a Tenth Circuit decision that
03:11:34 11 does say that defendant should be entitled to present
03:11:40 12 evidence of someone's character from which the jury
03:11:42 13 could infer that they were the aggressor in a situation.
03:11:46 14 So I will cite that law.

03:11:49 15 THE COURT: What was the type of lawsuit in
03:11:51 16 that Tenth Circuit case?

03:11:56 17 MR. HARTZOG: That was a case where -- it
03:12:04 18 was a law enforcement case, use of force, use of deadly
03:12:07 19 force.

03:12:08 20 And the Tenth Circuit held that evidence
03:12:13 21 should have been allowed to come in that the officer was
03:12:15 22 acting in self-defense, that would tend to show that the
03:12:21 23 individual decedent was the aggressor in the situation.
03:12:26 24 So I think some of the prior incidents with law
03:12:29 25 enforcement where he attacked law enforcement would come

03:12:33 1 in under that rationale.

03:12:34 2 THE COURT: Remind me of the cite to that
03:12:37 3 Tenth Circuit case.

03:12:38 4 MR. HARTZOG: Yes, Your Honor. It is
03:12:43 5 Perrin v. Anderson 784 F.2d 1040. And we discuss that
03:12:50 6 in our trial brief on page 3.

03:12:50 7 THE COURT: Okay. I'll go back and look at
03:13:05 8 that.

03:13:05 9 MS. EDWARDS: Your Honor, I would just posit
03:13:09 10 for the record that I really don't think self-harm is
03:13:11 11 indicative of being an aggressor towards someone else.

03:13:15 12 THE COURT: There's no Fourth Circuit case
03:13:17 13 adopting the interpretation that the Perrin court
03:13:21 14 applied to 404(a). And the fact that 404(a) got amended
03:13:26 15 following that decision seems to me to dilute your
03:13:29 16 argument. So I'm holding the course here.

03:13:33 17 MR. HARTZOG: Thank you, Your Honor.

03:14:01 18 THE COURT: Exclusion of any reference to
03:14:03 19 determinations regarding the facts by Lorrin Freeman,
03:14:09 20 the Raleigh Police Department, and/or internal affairs.
03:14:20 21 So what's your response?

03:14:22 22 MS. EDWARDS: And, Your Honor, that was our
03:14:25 23 motion. Essentially two-fold. Number one, I'll start
03:14:30 24 with the internal affairs. The internal affairs
03:14:33 25 decision regarding Officer Edwards, it essentially goes

03:14:40 1 to the final question in this case. It determined that
03:14:43 2 he reasonably used force. And it's important, I think,
03:14:48 3 that the Raleigh Police Department policy mirrors the
03:14:51 4 case law in the Fourth Circuit regarding excessive force
03:14:55 5 and when force is reasonable. And the findings in that
03:14:58 6 case, the ultimate findings were that he acted within
03:15:03 7 policy, and thus reasonably used force. And that
03:15:06 8 invades the province of the jury.

03:15:08 9 The same is true of Lorrin Freeman's
03:15:11 10 findings, which were essentially the exact same. And
03:15:13 11 they're actually quoted within the Raleigh Police
03:15:16 12 Department's Internal Affairs decision.

03:15:20 13 And then on top of that, I think it's --
03:15:24 14 these are completely different standards, especially
03:15:28 15 with respect to the decision that the prosecutor makes.
03:15:31 16 I mean, the prosecutor determines whether she can prove
03:15:33 17 beyond a reasonable doubt that he's guilty of murder or
03:15:40 18 some lower offense. And I think that's very confusing
03:15:43 19 to the jury to introduce evidence like that because it
03:15:46 20 indicates (A) it indicates sort of a seal of approval on
03:15:57 21 the behavior, but it's looking at it from a much higher
03:16:00 22 criminal standard than we have here.

03:16:02 23 THE COURT: Let me ask you this: Are you
03:16:03 24 going to argue that the defendant failed to follow
03:16:06 25 policies and procedures with respect to dealing with a

03:16:09 1 suspect that presented mental health issues?

03:16:17 2 MS. EDWARDS: We did not plan to, Your
03:16:19 3 Honor, because we did -- I mean, assuming -- we would
03:16:23 4 argue that, yes, if mental health issues were
03:16:26 5 introduced. But since that evidence is excluded, no,
03:16:29 6 we would not argue that because that would be equally
03:16:32 7 confusing to the jury.

03:16:34 8 THE COURT: So I think the lay of the land,
03:16:40 9 as it is now, this part should be allowed. I don't see
03:16:44 10 Lorrin Freeman's investigation or the Internal Affairs
03:16:49 11 unit -- I don't see it tipping the scale as more
03:16:53 12 probative than prejudicial. I think it also adds time
03:16:57 13 to this trial and kind of confuses the jury.

03:17:05 14 MR. HARTZOG: Could I make one small point?
03:17:07 15 I do think -- I'll obviously defer to whatever ruling
03:17:12 16 the Court makes. I do think we should be able to say
03:17:14 17 that he acted in accordance with policy, and that's what
03:17:18 18 this internal affairs decision was reviewing.

03:17:21 19 And I also want to point out that they are
03:17:24 20 also seeking to introduce a reprimand that Officer
03:17:28 21 Edwards got for not turning on his body camera. And if
03:17:30 22 they're going to be introducing evidence of, you know,
03:17:35 23 they determined he violated policy here, then I think we
03:17:38 24 should be able to introduce evidence that shows: But
03:17:40 25 not with respect to the shooting itself. So.

03:17:43 1 I think it would be unfair for them to be
03:17:47 2 able to introduce reprimands without us
03:17:51 3 introducing the --

03:17:52 4 THE COURT: Let's go back and look at it
03:17:53 5 from that perspective.

03:17:55 6 MS. EDWARDS: Your Honor, if I may. It is
03:17:59 7 true that Officer Edwards didn't turn his body camera
03:18:02 8 on. And we're in 2023. It's not like the jury isn't
03:18:06 9 going to know that officers are equipped with body
03:18:10 10 cameras, especially in the Raleigh Police Department.
03:18:13 11 We don't need to introduce evidence that he was formally
03:18:16 12 reprimanded, as long as we can introduce evidence -- as
03:18:19 13 long as we can ask him, and he's been asked this before,
03:18:22 14 whether he failed to turn his body camera on. It
03:18:25 15 doesn't matter to us. The failure itself is what
03:18:27 16 matters.

03:18:28 17 THE COURT: Okay. So they're not going to
03:18:31 18 be making a big deal out of a reprimand for not turning
03:18:36 19 on his body camera.

03:18:38 20 MR. HARTZOG: They have also sought to
03:18:39 21 introduce evidence of prior internal affairs
03:18:43 22 investigations of Officer Edwards that I also think
03:18:45 23 should not come in. But if they do, then I think the
03:18:47 24 internal affairs investigation into this incident in all
03:18:50 25 fairness should also come in, because if they're saying

03:18:53 1 he's been reprimanded in the past for these other --
03:18:58 2 what were relatively minor incidents, then I think it
03:19:02 3 would be fair for the jury to hear: But they didn't
03:19:05 4 reprimand him for this.

03:19:08 5 So if all those other IAs are kept out, then
03:19:11 6 I understand. But if those come in, then I think this
03:19:14 7 should come in.

03:19:14 8 THE COURT: So clearly you would be making
03:19:16 9 an objection if that question was asked of the witness?

03:19:20 10 MR. HARTZOG: We have, and we've made a
03:19:22 11 motion in limine on that front as well, Your Honor.

03:19:24 12 THE COURT: If that was an issue -- or is
03:19:26 13 that an issue? Are you going to be trying to introduce
03:19:29 14 that?

03:19:29 15 MS. EDWARDS: Well, Your Honor, yes. And I
03:19:34 16 think we can limit what we would actually introduce.
03:19:37 17 But it's for a completely different purpose. The
03:19:40 18 purpose for this would be punitive damages. I mean, it
03:19:44 19 is a question, and under the North Carolina pattern jury
03:19:46 20 instructions it's very clear that one of the things that
03:19:50 21 the jury must consider in whether and what to award in
03:19:55 22 terms of punitive damages is whether there has been
03:19:58 23 similar past conduct. It's crystal clear. If we
03:20:03 24 have -- and I don't have it in front of me, but if we
03:20:08 25 have instances of similar past conduct, and we could

03:20:11 1 submit it to you even to review for that determination,
03:20:14 2 that is what we would seek to admit. Not every IA
03:20:17 3 investigation or every complaint ever. But we think
03:20:20 4 that is relevant.

03:20:24 5 MR. HARTZOG: And for the same reason, Your
03:20:25 6 Honor, if they're going to be arguing punitive damages
03:20:28 7 to the jury and say: Look, he's been -- look at all
03:20:31 8 these issues he's had. Which he hasn't had that many.
03:20:35 9 But if they're trying to point to his past issues to
03:20:38 10 support punitive damages for this case, I think it's
03:20:41 11 only fair for him to be able to say: Okay, they looked
03:20:44 12 at, you know, there's alcohol at a football game,
03:20:47 13 something like that. But in this particular case they
03:20:49 14 found that I didn't violate the policy. So if they're
03:20:52 15 going to point to past policy violations to support a
03:20:55 16 punitive damages argument, I think it's only fair for
03:20:57 17 the jury to hear what the internal affairs department
03:21:00 18 felt about this incident.

03:21:01 19 THE COURT: But with respect to Ms. Freeman,
03:21:04 20 the decision not to bring criminal charges --

03:21:07 21 MR. HARTZOG: I'll withdraw that.

03:21:10 22 THE COURT: All right. So Lorrin Freeman is
03:21:12 23 out.

03:21:13 24 So we're talking about the Raleigh Police
03:21:17 25 Department?

03:21:17 1 MR. HARTZOG: Correct, Your Honor. And
03:21:19 2 that's if the other incidents should come in, then I
03:21:21 3 think it's only fair that this come in, particularly if
03:21:26 4 they're going to be arguing from a punitive damages
03:21:28 5 perspective that he should be punished in part because
03:21:30 6 of these past IA investigations, for the jury to hear
03:21:34 7 what the IA investigation into this particular incident
03:21:36 8 found.

03:21:46 9 MS. EDWARDS: Your Honor, what about this
03:21:47 10 compromise? We, instead of bringing in the IA
03:21:54 11 investigations, which we may or may not even want to do,
03:21:58 12 candidly; it's just a lot, and we would not want to risk
03:22:03 13 confusing the jury. We think the issues here are
03:22:06 14 relatively simple and straightforward. But could I ask
03:22:09 15 Defendant Edwards about it when he's on the stand? Can
03:22:13 16 I ask him: Have you ever been reprimanded before? And
03:22:16 17 just get his answer. And use those documents if needed
03:22:20 18 for impeachment purposes?

03:22:27 19 MR. HARTZOG: Your Honor, that wouldn't be
03:22:28 20 impeachment. She's affirmatively introducing the
03:22:31 21 evidence to him.

03:22:32 22 THE COURT: Well, if he said no.

03:22:34 23 MR. HARTZOG: But if he said yes, would we
03:22:35 24 just leave it with the jury unknown what those were?
03:22:38 25 That seems prejudicial to Officer Edwards.

03:22:46 1 THE COURT: Well, you've got cross, don't
03:22:49 2 you?

03:22:50 3 MR. HARTZOG: I suppose, Your Honor. But
03:22:51 4 what that means is, in effect, all she has to do is say:
03:22:54 5 Have you ever been reprimanded? And all of a sudden all
03:22:57 6 of this evidence comes in, which we think should not.
03:23:00 7 But if they're doing that, then, again, I think if he's
03:23:03 8 been reprimanded before: Were you reprimanded for this
03:23:07 9 incident? That should be a fair question in response
03:23:09 10 to that. And I think if you're going to bring in his
03:23:14 11 past IA stuff, it would be totally unfair to bring in
03:23:16 12 all past stuff and not this one that the jury is
03:23:19 13 supposed to be considering.

03:23:23 14 THE COURT: Were you reprimanded for this
03:23:26 15 incident?

03:23:27 16 No.

03:23:28 17 MR. HARTZOG: He was not. Well, he was for
03:23:31 18 the body camera, which we think should not come in. And
03:23:35 19 they said they now don't intend to introduce that. So
03:23:40 20 I think that would also be a backdoor way to bring that
03:23:41 21 in, which should not come in.

03:23:41 22 THE COURT: It really isn't a big deal, is
03:23:44 23 it, in the scheme of things?

03:23:45 24 MR. HARTZOG: I think it is, Your Honor,
03:23:46 25 because what they're trying to imply is that he did this

03:23:49 1 intentionally and that he didn't turn on the body
03:23:51 2 camera. And he can explain why he didn't. I'm not
03:23:57 3 even sure -- and we've got a motion in limine on whether
03:24:01 4 he turned on the body camera or not.

03:24:03 5 It's not relevant at all to whether he used
03:24:06 6 excessive force. It just has no bearing on the jury's
03:24:10 7 analysis of was excessive force used in this case? So
03:24:13 8 I'm not even sure what issue the body camera goes to
03:24:16 9 that's properly before the jury. So I don't think that
03:24:19 10 should come in in the first place because it has zero to
03:24:22 11 do with whether he used excessive force and can only
03:24:25 12 serve to confuse the jury. It's not probative to
03:24:31 13 anything.

03:24:31 14 THE COURT: It kind of sets the stage,
03:24:34 15 though, doesn't it. It kind of adds to the story
03:24:36 16 that's being told. It explains something or the lack
03:24:40 17 of something, doesn't it?

03:24:42 18 MR. HARTZOG: Well, I'm not sure --
03:24:46 19 THE COURT: So you're not speculating: What
03:24:48 20 would the camera -- what would the film be?

03:24:51 21 MR. HARTZOG: Well, I suppose we could
03:24:53 22 stipulate that there is no body camera footage. And
03:24:56 23 that answers that question for the jury.

03:24:57 24 But they're trying to imply some wrongdoing
03:24:59 25 by him not turning it on, and I think that's what's

03:25:02 1 inappropriate.

03:25:07 2 THE COURT: Well, you have cross, don't you?

03:25:09 3 MR. HARTZOG: I do, Your Honor. But I think
03:25:11 4 once we're in cross on that, we're already in that
03:25:14 5 prejudicial territory of this piece of evidence that is
03:25:17 6 not probative, that is entirely designed to imply to the
03:25:21 7 jury that he did something wrong by not turning on his
03:25:24 8 body camera.

03:25:25 9 THE COURT: Well, doesn't it also --

03:25:27 10 couldn't it also be used to explain a certain state of
03:25:41 11 mind?

03:25:43 12 MR. HARTZOG: I think he will testify to his
03:25:45 13 state of mind, that he got out of the car, and he was
03:25:47 14 not expecting to find the guy. I don't think whether
03:25:50 15 he turned on his body camera or not has any bearing on
03:25:54 16 his state of mind.

03:25:55 17 THE COURT: Have you ever not turned your
03:25:57 18 body camera on? How many --

03:25:59 19 MR. HARTZOG: We're getting into past
03:26:01 20 conduct. And I just think it's entirely irrelevant
03:26:05 21 because if the jury is sitting here thinking: Well, he
03:26:08 22 must have -- there's a reason he didn't turn on his body
03:26:11 23 camera. Then that's the prejudice to Officer Edwards.
03:26:14 24 And I think it's just not at all related to whether he
03:26:17 25 used excessive force.

03:26:18 1 THE COURT: Well, if he didn't turn it on
03:26:20 2 because it had been at the shop the last week, and he'd
03:26:24 3 just gotten used to not having it, you know, wouldn't
03:26:27 4 that explain it? I mean --
03:26:29 5 MR. HARTZOG: I guess my point, Your Honor,
03:26:30 6 is: We shouldn't have to explain it because it's not
03:26:32 7 relevant.
03:26:35 8 THE COURT: I'm not -- do you think it's
03:26:37 9 relevant?
03:26:38 10 MS. EDWARDS: Yes, Your Honor. I think
03:26:39 11 there is a huge difference between a fact that is
03:26:41 12 prejudicial and a fact that is bad for your client.
03:26:44 13 And I think that's what we're confronted with here.
03:26:46 14 This is not a good fact for Defendant Edwards. We
03:26:49 15 concede that. That doesn't make it prejudicial. It's
03:26:51 16 relevant, and it goes to a number of things. But in an
03:26:54 17 excessive force case it goes to credibility; it goes to
03:26:57 18 intent, motive, opportunity, all the things that we know
03:27:00 19 under 404 --
03:27:02 20 THE COURT: This comes in. It's an
03:27:04 21 intrinsic part of the facts of that time. And it comes
03:27:11 22 in. The significance of which, you know, that's up to
03:27:13 23 the jury. And it may be no significance. But it
03:27:19 24 comes in.
03:27:20 25 MS. EDWARDS: Your Honor, if I may, if it's

03:27:23 1 helpful to streamline this former internal affairs,
03:27:28 2 we're content with no internal affairs.

03:27:30 3 THE COURT: Okay.

03:27:32 4 MS. EDWARDS: That's fine. We don't need to
03:27:34 5 talk about it.

03:27:35 6 MR. HARTZOG: I do think that resolves a lot
03:27:37 7 of that issue.

03:27:38 8 THE COURT: Yes.

03:27:39 9 MR. HARTZOG: I will say they are also
03:27:40 10 intending to introduce a prior list of use of forces,
03:27:45 11 which has no context to it other than a number, which I
03:27:49 12 also believe is prejudicial. It's along the same lines
03:27:55 13 of the former IA files would be, which is: Has he used
03:27:58 14 force in any way before? And they have to document that
03:28:01 15 they used force. That could be grabbing someone's arm
03:28:05 16 to handcuff them, whether it's justified/not justified
03:28:11 17 is not reflected in the list or number of use of forces.

03:28:15 18 THE COURT: Who is going to be testifying to
03:28:17 19 that?

03:28:17 20 MR. HARTZOG: Well, the plaintiffs have
03:28:18 21 listed it as an exhibit. I don't know who they intend
03:28:21 22 to introduce it through.

03:28:24 23 MS. EDWARDS: Well, I suppose we would be
03:28:27 24 giving it to the defendant in terms of who we would be
03:28:31 25 introducing it through. And he certainly could

03:28:34 1 explain. If there was no issue with them with respect,
03:28:43 2 you know, being deemed reasonable, that wouldn't be a
03:28:45 3 problem for him, I would suppose.

03:28:47 4 MR. HARTZOG: We're talking about judicial
03:28:50 5 economy. We're going to have to go through each time
03:28:53 6 he's ever used force and what it was and why he used it?
03:28:55 7 And without doing that, the implication is left for the
03:28:59 8 jury that it's unauthorized or excessive in some way.

03:29:04 9 THE COURT: How many times are there?

03:29:08 10 MR. HARTZOG: I don't have the number in
03:29:10 11 front of me, Your Honor. Give me one second.

03:29:24 12 Sixty-five Your Honor.

03:29:27 13 THE COURT: How many?

03:29:28 14 MR. HARTZOG: Sixty-five in his 23-year
03:29:30 15 career.

03:29:32 16 THE COURT: Are you going to go through each
03:29:34 17 one?

03:29:34 18 MR. HARTZOG: Your Honor, that's my point.
03:29:36 19 Do we have to? Because I think just saying: Oh, you
03:29:39 20 used force 65 times before without context is
03:29:42 21 prejudicial. But if that comes out, then we have to go
03:29:45 22 through and say: Okay, let's talk about number one,
03:29:48 23 number two, number three. And I just don't think it's
03:29:53 24 relevant at all.

03:29:55 25 THE COURT: How do you, if you were allowed

03:29:59 1 to introduce that evidence, how would you go about doing
03:30:02 2 it?

03:30:02 3 MS. EDWARDS: Well, I suppose, Your Honor,
03:30:04 4 that I would, I think -- I would limit it to -- I would
03:30:09 5 limit what we would be looking at to more recent uses of
03:30:14 6 force because I actually think it's much more relevant.
03:30:18 7 He had been on the force for 23 years; what he's likely
03:30:21 8 to do in year one is different from what he's likely to
03:30:26 9 do in year 18, 20. So I think some time limitation may
03:30:31 10 be appropriate.

03:30:32 11 THE COURT: What do you think? How many
03:30:33 12 years?

03:30:37 13 MS. EDWARDS: Ten, maybe.

03:30:39 14 THE COURT: Ten years?

03:30:41 15 MR. HARTZOG: Your Honor, I think we're
03:30:42 16 getting into 404 territory. They're trying to -- or
03:30:45 17 406, trying to show: Well, he used force before, so
03:30:48 18 therefore he must have used force here. Which we agree
03:30:52 19 he used force. That's why I'm not sure it's relevant
03:30:55 20 in the first place. But they're trying to paint a
03:30:58 21 picture here based on misleading information. There's
03:31:02 22 no evidence in the record or in their pretrial
03:31:04 23 disclosures about what these incidents are.

03:31:08 24 THE COURT: Well --

03:31:09 25 MR. HARTZOG: They just want to show a

03:31:14 1 statistic saying: Here's how many.

03:31:17 2 THE COURT: And they were justified?

03:31:20 3 MR. HARTZOG: I believe they were. But

03:31:21 4 we'd have to go through each one to --

03:31:25 5 THE COURT: Well, that leads to that.

03:31:27 6 MR. HARTZOG: And their burden would have

03:31:28 7 been to show in discovery that these were sufficiently

03:31:33 8 related to the incident and that there was some

03:31:37 9 wrongdoing there. I don't think you can just print up

03:31:42 10 a list and say: Okay, here's the 65 times you used

03:31:45 11 force in your career, and just let the jury sit with

03:31:48 12 that. I think that's prejudicial.

03:31:50 13 THE COURT: Would an expert be likely to

03:31:53 14 testify, given the type of police work your client's

03:31:58 15 done and the length of time, that it would probably be

03:32:01 16 reasonable to have that many, if not more, documented

03:32:05 17 examples?

03:32:06 18 MR. HARTZOG: I think that would be

03:32:07 19 appropriate for an expert, but that's not what any

03:32:09 20 expert in this case to date has testified to. There is

03:32:12 21 no expert testimony on any prior specific uses of force.

03:32:16 22 And that's what I think is the issue is that you can't

03:32:19 23 just introduce a number and introduce a report saying he

03:32:24 24 used force this many times without some additional

03:32:28 25 information.

03:32:29 1 THE COURT: Well, does it backfire on the
03:32:31 2 plaintiff if the follow-up question is: Any documented
03:32:38 3 use of force subject to review and analysis by the
03:32:41 4 internal affairs unit as to whether or not it was
03:32:44 5 appropriate?

03:32:45 6 Yes.

03:32:47 7 MR. HARTZOG: Perhaps it does, Your Honor,
03:32:48 8 but then we're opening the door back up to all that
03:32:50 9 prior IA stuff. It just seems like --

03:32:53 10 THE COURT: Then the next question would be:
03:32:55 11 Well, were you disciplined as a result of any of these
03:33:01 12 65 uses of force that were each separately investigated?

03:33:06 13 No.

03:33:07 14 I mean doesn't that kind of shoot their
03:33:09 15 position in the foot a little bit, that he's been --

03:33:13 16 MR. HARTZOG: Somewhat, Your Honor, but the
03:33:15 17 jury is still left with this implication of 65 uses of
03:33:19 18 force, and a jury hears "use of force," and they think
03:33:22 19 something different than what is it. It could be as
03:33:25 20 simple as putting someone in handcuffs or grabbing
03:33:29 21 someone's shoulder to get them to talk to you.

03:33:31 22 THE COURT: Which you would elicit from him.

03:33:33 23 MR. HARTZOG: Well, again, Your Honor,
03:33:34 24 that's what I'm saying we shouldn't have to do because
03:33:37 25 we have to go back through, and it's just we have to go

03:33:39 1 through each one of these.

03:33:41 2 THE COURT: So it just comes back to 404(b)?

03:33:44 3 MR. HARTZOG: I think so, Your Honor, and it
03:33:46 4 just not being -- a number not being relevant.

03:33:50 5 MS. EDWARDS: Your Honor, we would not be
03:33:52 6 introducing this evidence to show conformity. That's
03:33:56 7 not the point of it. It can show motive, intent, plan,
03:34:01 8 knowledge; it can show those things. It can also be an
03:34:04 9 important indicator of past similar conduct for punitive
03:34:09 10 damages purposes.

03:34:10 11 THE COURT: But then you're going to have to
03:34:12 12 go and you're going to have to go through each of the
03:34:15 13 incidences, aren't you, to know whether it falls into
03:34:18 14 that category of past similar wrongdoing, right?

03:34:23 15 MS. EDWARDS: Potentially within some
03:34:25 16 limited timeframe, I would say.

03:34:27 17 THE COURT: So you think ten years, but you
03:34:28 18 probably want to look at it after this hearing, think
03:34:31 19 about it a little bit, get your thoughts together. And
03:34:34 20 then this could be something we take up at another time.
03:34:41 21 What do you think?

03:34:42 22 MS. EDWARDS: Yes, Your Honor, that would be
03:34:43 23 appropriate.

03:34:44 24 THE COURT: And you all talk. Maybe you
03:34:45 25 can at least narrow it down a little bit, and I can make

03:34:48 1 a decision.

03:34:52 2 Okay. So what else can we do today? From
03:34:57 3 defendant's side, what would you really like to focus on
03:35:00 4 in the time we've got left?

03:35:04 5 MR. HARTZOG: Well, I suppose, Your Honor,
03:35:08 6 we should talk about our motion for special
03:35:10 7 interrogatories.

03:35:11 8 THE COURT: Yes, let's do that.

03:35:15 9 Now, I'm a little confused. You've
03:35:19 10 proposed, as I understand, it these special
03:35:22 11 interrogatories for the purpose of preserving the
03:35:26 12 ultimate issue for decision by me, right?

03:35:31 13 MR. HARTZOG: Correct, Your Honor.

03:35:31 14 THE COURT: But the way I read some of your
03:35:33 15 proposed jury instructions, you would have the Court
03:35:36 16 instructing the jury on the question of qualified
03:35:38 17 immunity.

03:35:39 18 MR. HARTZOG: Well, I will concede that may
03:35:43 19 be an error, because I think qualified immunity is an
03:35:47 20 issue for the Judge. Which is why I think these
03:35:49 21 special interrogatories are the correct way to handle
03:35:52 22 qualified immunity.

03:35:53 23 THE COURT: So you do believe that that's
03:35:54 24 for me to decide?

03:35:55 25 MR. HARTZOG: I do, Your Honor.

03:35:57 1 THE COURT: So if I find some jury
03:35:58 2 instructions where you seem to want me to instruct the
03:36:00 3 jury as to that, I'm just going to disregard them.

03:36:03 4 MR. HARTZOG: I think the ultimate issue of
03:36:06 5 qualified immunity is a question of law. But I think
03:36:09 6 in order to make that decision, the facts need to be
03:36:12 7 fleshed out by fact finders to allow you to make that
03:36:15 8 decision.

03:36:16 9 THE COURT: Okay. What is plaintiff's
03:36:19 10 thought on all that?

03:36:21 11 MS. EDWARDS: Well, Your Honor, a few
03:36:24 12 things. Our opposition sets this forth in more detail.
03:36:29 13 But obviously special interrogatories go to the issue of
03:36:33 14 qualified immunity, but more specifically to the prong
03:36:36 15 of clearly established law because the constitutional
03:36:39 16 violation is part and parcel with the jury determination
03:36:44 17 about whether there was a 1983 violation to begin with.
03:36:48 18 So the real question that any special interrogatory
03:36:53 19 would want to get at is whether there was a violation of
03:36:56 20 clearly established law.

03:36:57 21 And candidly, I don't think the defendant
03:37:01 22 has pointed to a single factual question that, if
03:37:04 23 resolved in his favor, would result in a finding of -- I
03:37:12 24 guess, a finding that the law was not clearly
03:37:13 25 established as to this particular issue. So in our

03:37:16 1 mind there's no need for special interrogatories.

03:37:20 2 Let's start with this: There's no need for

03:37:22 3 special interrogatories because the analysis is subsumed

03:37:25 4 by the ultimate question to the jury: Was there a 1983

03:37:29 5 violation here? Which wouldn't be put that way,

03:37:31 6 obviously, but: Was there excessive force that was

03:37:34 7 used? And obviously you would instruct the jury on

03:37:38 8 what that would mean.

03:37:39 9 But the defendant hasn't identified a single

03:37:42 10 factual question. But also the way that these

03:37:44 11 questions are written is particularly problematic. I'm

03:37:48 12 happy to go through one by one.

03:37:50 13 So for the first one, the question is: Did

03:37:54 14 Soheil Mojarrad hold a knife?

03:37:56 15 And for the second one -- because these are

03:37:58 16 sort of similar in some ways, a lot of the case law

03:38:01 17 falls squarely within both of these: Did Soheil Mojarrad

03:38:05 18 fail to comply with Officer Edwards's orders?

03:38:07 19 Well, actually, the Fourth Circuit recently

03:38:10 20 held -- and I know this wouldn't be clearly established

03:38:13 21 law, but it's held many times that noncooperation with

03:38:16 22 law enforcement has never given officers carte blanche

03:38:20 23 to use deadly force against a suspect.

03:38:23 24 Luckily for many of us, neither has being

03:38:26 25 armed with a small knife. That's what they said in the

03:38:29 1 Estate of Jones by Jones v. City of Martinsburg, but it
03:38:33 2 also looked at the holding in Connor v. Thompson, the
03:38:37 3 holding in Wilson v. Prince George's County. Those
03:38:40 4 have plainly established that failure to --
03:38:45 5 noncompliance and possession of a weapon, particularly a
03:38:50 6 knife, but possession of a weapon is not enough to
03:38:53 7 authorize deadly force.

03:38:58 8 Let's go to the next one. Special
03:38:59 9 Interrogatory Number 3 -- and, actually, this is -- I
03:39:03 10 must be reading this wrong, but my reading of number 3
03:39:07 11 and number 7 is basically the same thing: Did Soheil
03:39:11 12 Mojarrad threaten Officer Edwards with a knife? and Each
03:39:14 13 time Officer Edwards fired his weapon, did he reasonably
03:39:17 14 believe that Soheil Mojarrad had threatened him with a
03:39:20 15 knife? I think those are the same.

03:39:22 16 But regardless, those don't actually answer
03:39:25 17 any question that's informative to whether -- those
03:39:30 18 don't answer any question to whether it's clearly
03:39:33 19 established law because it just doesn't give you any
03:39:37 20 relevant information. Whether he threatened him is not
03:39:39 21 the issue. The threat had to be imminent; it had to be
03:39:42 22 deadly; it had to be articulable. There are things
03:39:46 23 that just are fully unhelpful with respect to these two.

03:39:51 24 The next one, number 4, is the special
03:39:54 25 interrogatory: Was Soheil Mojarrad standing within 20

03:39:58 1 feet or closer to him, to Officer Edwards, with the
03:40:02 2 knife? Well, that also isn't helpful. First of all,
03:40:06 3 there is absolutely no testimony in this case by any
03:40:10 4 expert, and, in fact, their expert says there's no such
03:40:14 5 thing as the 21-foot rule. What that means is someone
03:40:19 6 within 21 feet holding a knife, that doesn't give you
03:40:23 7 authority no shoot. Everyone has said that.

03:40:25 8 Even if there were a 21-foot rule, also all
03:40:28 9 of the experts have testified that that goes to the
03:40:33 10 amount of time that it would take an officer to draw his
03:40:36 11 weapon and fire, all at once. Well, Officer Edwards
03:40:41 12 already had his weapon out, so that's not really
03:40:44 13 relevant to anything.

03:40:45 14 But more importantly on the clearly
03:40:47 15 established issue is that Wilson v. P.G. County makes
03:40:51 16 clear that standing 20 feet away with a knife is not
03:40:53 17 enough, and even making some advancement, which is where
03:40:57 18 we go to interrogatory number 6. But I don't want to
03:41:01 19 skip over number 5.

03:41:05 20 I have to be candid; I don't completely
03:41:08 21 understand interrogatory number 5; it's: Each time
03:41:11 22 Officer Edwards fired his weapon, did he reasonably
03:41:14 23 believe that Soheil Mojarrad made a sudden movement? I
03:41:18 24 don't know how that helps you at all, candidly. He
03:41:23 25 could have made a sudden movement backwards; he could

03:41:25 1 have made a sudden movement to the side. He could have
03:41:28 2 put his arms down suddenly. A sudden movement is far
03:41:32 3 too vague to give you valuable information about whether
03:41:35 4 this would be clearly established under Fourth Circuit
03:41:37 5 precedent.

03:41:38 6 Interrogatory number 6: Each time Officer
03:41:40 7 Edwards fired his weapon, did he reasonably believe that
03:41:42 8 Soheil Mojarrad was starting to advance towards him with
03:41:45 9 a knife? That, likewise, Connor v. Thompson, Wilson v.
03:41:51 10 Prince George's County. And Connor v. Thompson, the
03:41:55 11 Fourth Circuit specifically held that it was
03:41:57 12 unreasonable for an officer to use lethal force where he
03:42:00 13 had a knife, refused to drop it, and slowly staggered
03:42:04 14 downstairs towards the officers. That's advancing.
03:42:07 15 Again, this is not helpful because advancing just means
03:42:10 16 going towards you. It doesn't give you any indication
03:42:13 17 of the level of threat that is being presented by any
03:42:16 18 advancement.

03:42:17 19 The same thing is true in Wilson v. Prince
03:42:21 20 George's County. The Fourth Circuit held -- and this
03:42:23 21 is 2018, so this is a year before the shooting of Soheil
03:42:27 22 Mojarrad. The Fourth Circuit held that an officer who
03:42:30 23 used excessive force was -- I'm sorry, that used lethal
03:42:35 24 force was excessive when he was standing about 20 feet
03:42:40 25 away from the officer holding a knife stumbling toward

03:42:44 1 the officer. Again, that's not particularly helpful.

03:42:50 2 In addition to all of this, in addition to

03:42:52 3 the fact that none of these facts will bear on whether

03:42:57 4 clearly established law was violated, they are

03:43:01 5 suggestive of an answer. They're putting in the jury's

03:43:05 6 head and elevating for the jury these particular ideas,

03:43:08 7 that maybe he had a knife -- not maybe, obviously we're

03:43:13 8 going to have presented a lot of evidence. But: Did he

03:43:15 9 have a knife? Is that critical to their decision about

03:43:18 10 whether excessive force is used? Did he disobey

03:43:23 11 commands to drop the knife? Is that critical to whether

03:43:26 12 excessive force was used?

03:43:28 13 So I actually think these, particularly in

03:43:32 14 their current form, are not only inappropriate but are

03:43:35 15 prejudicial towards the plaintiff.

03:43:37 16 THE COURT: If I decided that some special

03:43:40 17 interrogatories would be helpful to me, number one, I'd

03:43:47 18 like you to take a stab at it, at what you think would

03:43:50 19 be helpful to me; and, number two, do you think I should

03:43:55 20 send those in to the jury separately?

03:44:03 21 MS. EDWARDS: No, Your Honor. I mean, I

03:44:05 22 understand this concept that qualified immunity needs to

03:44:08 23 be decided at the earliest possible stage. But I'm

03:44:13 24 not -- we're at trial. This is the jury room. I mean,

03:44:16 25 this is the last stage of litigation. So I don't know

03:44:19 1 how that really helps the officer. Which is the
03:44:23 2 purpose of -- if you're going to be cloaked in qualified
03:44:27 3 immunity, it should be done early so you don't have to
03:44:29 4 be put through the rigors of litigation. Officer
03:44:32 5 Edwards has already been put through that, so it doesn't
03:44:35 6 save much.

03:44:36 7 THE COURT: Two genuinely disputed material
03:44:39 8 facts: Whether the decedent threatened the defendant
03:44:43 9 with a knife, one; and whether he was threateningly
03:44:47 10 advancing to defendant, two. Genuine issue of material
03:44:52 11 fact.

03:44:53 12 MR. HARTZOG: Understood, Your Honor.

03:44:54 13 THE COURT: We had to have this trial.

03:44:56 14 MR. HARTZOG: That's why we think the fact
03:44:58 15 finders should decide those facts.

03:44:59 16 And I'll tell, you Your Honor, each one of
03:45:01 17 these questions is modelled specifically on the finding
03:45:04 18 in Wilson v. Prince George's County where they said
03:45:09 19 that -- and again, as plaintiff's counsel mentioned, it
03:45:13 20 was not long before this incident. And they said that
03:45:16 21 it wasn't clearly established at the time, but it will
03:45:20 22 be established going forward that an officer cannot use
03:45:23 23 excessive force where the person is 20 feet away and has
03:45:26 24 not made any sudden movements, is not threatening
03:45:31 25 anyone, and has ignored the officer's repeated commands.

03:45:35 1 THE COURT: Remind me of the cite to that
03:45:36 2 case.

03:45:37 3 MR. HARTZOG: Your Honor, it's 893 F.3d 213.

03:45:42 4 So our position is if there was a

03:45:45 5 threatening behavior or a sudden movement, then that is

03:45:51 6 outside of the context of what Wilson v. Prince George's

03:45:55 7 County held was now clearly established. So, in other

03:45:58 8 words, they said that even in 2018 it wasn't clearly

03:46:02 9 established that you couldn't use deadly force against

03:46:05 10 an individual standing 20 feet away not threatening the

03:46:08 11 officer or making sudden movements, but going forward it

03:46:11 12 would be. So the role of the Court would be: Is this

03:46:15 13 like Prince George's County where there was no

03:46:17 14 threatening movement, no sudden movement, or is it

03:46:25 15 outside of the context of what Wilson v. Prince George's

03:46:28 16 County held to be clearly established law?

03:46:31 17 And then it's also modelled in part on other

03:46:38 18 case law. If you give he one second, Your Honor --

03:47:03 19 THE COURT: Well, I am prepared to say at

03:47:05 20 this point that I do believe some special

03:47:08 21 interrogatories could be helpful. And I'm inviting the

03:47:15 22 plaintiff, who points out, I think quite appropriately,

03:47:19 23 that "sudden movement" is pretty vague.

03:47:29 24 MR. HARTZOG: But again, Your Honor, that's

03:47:30 25 exactly the phrase that the Fourth Circuit used in

03:47:33 1 Wilson v. Prince George's County in saying that going
03:47:37 2 forward it's not clearly established if there was no
03:47:39 3 sudden movement. So the "sudden movement" language is
03:47:44 4 directly from Wilson v. Prince George's County.

03:47:47 5 THE COURT: I want to review that case
03:47:49 6 again.

MS. EDWARDS: Your Honor, I also think "sudden movement" in the context of Wilson is different from the sudden movement in this context. And most importantly, Wilson himself, who was shot, had been -- had committed an assault, had committed a battery, had been actively threatened; he was being pursued for an act of violence. So a sudden movement in that context may look different from a sudden movement when somebody took a cell phone off of a table at the Sheetz. I think you've got to look at the totality. And just because there was a sudden movement and that particular language is used in Wilson, it doesn't mean that it creates qualified immunity.

03:48:37 20 THE COURT: Well, I'd like very much to see,
03:48:41 21 without waiving your objection to any special
03:48:43 22 interrogatories, if you would like, and you certainly
03:48:46 23 don't have to, I'm just giving you the opportunity to
03:48:50 24 take a stab at what --

03:48:54 25 MS. BEIGHTOL: Your Honor, what is the best

03:48:55 1 way to get -- you've suggested two different items for
03:48:58 2 us to draft. What is the best way for us to provide
03:49:01 3 those to you?

03:49:02 4 THE COURT: What I'd like you to do is go
03:49:03 5 ahead and file them. You can just attach it to
03:49:13 6 something you call a notice and just index what is it on
03:49:18 7 the front of the notice, then just attach one as A and
03:49:22 8 one as B.

03:49:23 9 Ms. Collins, do you have any other helpful
03:49:26 10 advice?

03:49:27 11 I want you to file it because I want it to
03:49:33 12 be transparent on the docket.

03:49:40 13 MS. EDWARDS: Your Honor, should we email
03:49:42 14 those in Word format as well since they're a proposed
03:49:48 15 verdict form?

03:49:50 16 THE COURT: I don't haven't a lot of
03:49:51 17 heartburn with you not. Just file it.

03:49:53 18 THE CLERK: You can use the event notice
03:49:55 19 "Other."

03:49:56 20 MS. BEIGHTOL: One other clarifying question,
03:49:57 21 just because you had asked us earlier if there were
03:50:01 22 things we could talk about that may make things easier
03:50:04 23 as we go to trial. We understand that exhibits are due
03:50:07 24 within seven days of trial. We also understand that
03:50:10 25 Your Honor appreciates electronics. So we wanted to

03:50:14 1 inquire with you, especially because several of the
03:50:17 2 exhibits are video, whether it would be more convenient
03:50:20 3 for Your Honor to receive them in a link with an
03:50:25 4 electronic format versus in paper, or how you would --
03:50:30 5 THE COURT: I'm really glad you brought that
03:50:32 6 up. Let me go back and look at what I told you to do.
03:50:39 7 Because sometimes I think we tell people to do more than
03:50:43 8 what they really need to do. I know there are a lot of
03:50:48 9 pressures on both sides. And I want my exhibits when
03:50:51 10 we start trial, to be honest. I don't really need them
03:50:55 11 seven days before.

03:50:57 12 MS. BEIGHTOL: I got that, to be fair, from
03:50:59 13 the local rule. And I didn't see anything about it --
03:51:03 14 specific directions in your order. But just whether
03:51:06 15 you like paper versus electronic versus -- you know,
03:51:11 16 what you would like and how you would like it.

03:51:14 17 It sounded like there was a direction for a
03:51:16 18 second notebook for the jury. And again, our documents
03:51:20 19 tend to be -- a lot of them are video. And then the
03:51:23 20 ones that aren't video may be lengthy documents that we
03:51:26 21 may only use a portion of. And rather than burdening
03:51:29 22 the Court or jury with stacks of paper, we wanted to
03:51:32 23 inquire as to your preference.

03:51:44 24 THE COURT: The clerk is looking at me.

03:51:47 25 THE CLERK: I'll be glad to go over that

03:51:50 1 after we're done here, how to present exhibits.

03:51:54 2 THE COURT: Let's talk about -- and I'll

03:51:57 3 invite Sandra to pipe up. I think there may be a

03:52:01 4 little bit of inconsistency in my drafting of the trial

03:52:05 5 scheduling order. I think it was my intention to

03:52:08 6 obviate aspects of the local civil rules where I don't

03:52:12 7 really need the exhibits seven days before. I don't

03:52:15 8 think that serves any interest of mine. If there's

03:52:18 9 something specific I want, I'll ask for it. But then I

03:52:22 10 note at the very end of the order it says: All

03:52:26 11 requirements set forth in the local civil rules not

03:52:29 12 altered herein shall be strictly observed. So I think

03:52:33 13 if I want to do what I think I did, I need to be a

03:52:36 14 little bit plainer. So that's hindsight.

03:52:38 15 So let's just focus on your explicit

03:52:41 16 questions. I just want a book. Actually, I want --

03:52:47 17 how many exhibits are we talking about? What's the

03:52:50 18 volume of paper?

03:52:51 19 MS. BEIGHTOL: There is a large volume.

03:52:52 20 That's why I wondered if electronic might be more

03:52:55 21 pleasing to the Court. That's how we are circulating

03:52:57 22 it to each other, through a link with clearly identified

03:53:00 23 which exhibit is which. And because many of them are

03:53:03 24 video, if we were to do a notebook, it might be a

03:53:07 25 notebook with lots of disks or flash drives, and you

03:53:10 1 couldn't see it that way.

03:53:11 2 THE COURT: So you can give me something
03:53:13 3 electronic that's one-stop shopping?

03:53:16 4 MS. BEIGHTOL: Your Honor, we can give you,
03:53:17 5 at your preference, either a shared point link that you
03:53:20 6 could click on and look at everything in a folder, or we
03:53:23 7 could bring you a flash drive on the first day of trial;
03:53:26 8 whatever is your preference. Then the question would
03:53:30 9 be whether you want something separate in paper in the
03:53:34 10 courtroom too, or whether that is sufficient for all.

03:53:35 11 THE COURT: We need the paper for court.

03:53:37 12 And we need the videos separately. And then you're
03:53:42 13 supposed to make sure it's a format that can be played
03:53:45 14 in the jury room. Was that gone over with you this
03:53:47 15 morning?

03:53:48 16 MS. EDWARDS: Yes, Your Honor.

03:53:49 17 MR. HARTZOG: It was.

03:53:50 18 THE COURT: Okay. And I'm fine with taking
03:53:53 19 them into evidence at the end of the day. Just remember
03:53:56 20 what you've offered that day and give them all to
03:54:00 21 Sandra.

03:54:01 22 And I'm assuming, Sandra -- I haven't had a
03:54:06 23 civil trial -- it's been a couple months, hasn't it?

03:54:09 24 THE CLERK: It's been a little while.

03:54:11 25 THE COURT: But that's an efficiency right

03:54:13 1 there, just to go ahead and take them all in at the end
03:54:16 2 of the day or before lunch, maybe, the morning ones.

03:54:21 3 So we need the paper because I'm going to
03:54:23 4 send the paper to the jury room. And then we need the
03:54:27 5 video stuff, we need it separate. It could be played
03:54:32 6 from your laptop in the courtroom. But just at the end
03:54:35 7 of the day I want that disk in that format that's going
03:54:39 8 to play in the jury room.

03:54:41 9 MR. HARTZOG: Your Honor, should it be a
03:54:43 10 disk or a thumb drive, or whatever the technology rules
03:54:49 11 say?

03:54:49 12 THE CLERK: A disk.

03:54:51 13 MS. BEIGHTOL: Just to clarify, so first day
03:54:53 14 of trial we should each come with an electronic set of
03:54:56 15 exhibits on disk for Your Honor, and a separate paper
03:55:01 16 copy of everything to be used as needed?

03:55:03 17 THE COURT: I'm willing to use this trial as
03:55:05 18 my Guinea pig. I'm willing to go from paper to
03:55:08 19 electronic for my records. So a disk, thumb drive, I
03:55:17 20 don't really care.

03:55:18 21 Does that help you too?

03:55:18 22 MR. HARTZOG: I does, Your Honor.

03:55:21 23 THE COURT: Just bring it the first day.

03:55:34 24 And then you've got to bring one set of
03:55:36 25 paper for the clerk to take in. And you've got to bring

03:55:38 1 in the separately formatted on disks of the audio visual
03:55:45 2 whatever.

03:55:46 3 Sandra, does that comply with what you want?

03:55:46 4 THE CLERK: Yes, ma'am.

03:55:51 5 Just going over -- at the end of each day I
03:55:56 6 run a summary, an exhibit list. At the end of each day
03:55:59 7 you will be given a printed copy. So that night you
03:56:01 8 can go over it. But the exhibits that you have moved
03:56:05 9 to admit and have been admitted, I will need to collect
03:56:08 10 those at the end of each trial day.

03:56:11 11 THE COURT: And then that evening she's
03:56:14 12 amending, or the next day you're amending the list of
03:56:18 13 exhibits?

03:56:20 14 THE CLERK: That is correct.

03:56:20 15 THE COURT: And we will give, as soon as
03:56:22 16 she's done, you get it, and I get it, and it's very
03:56:25 17 helpful.

03:56:27 18 THE CLERK: So we have a running list. And
03:56:29 19 if you see something -- each day you'll get an
03:56:32 20 opportunity that if there's some discrepancy, we can
03:56:35 21 clarify it right then versus having to go five days back
03:56:38 22 or something, or look at the record.

03:56:41 23 THE COURT: They're preparing for you that
03:56:44 24 proposed exhibit list, right? They give you -- like,
03:56:47 25 the plaintiff will give you one? Remind me how that

03:56:50 1 works.

03:56:52 2 THE CLERK: We have the proposed pretrial
03:56:54 3 order, so your exhibits that are listed on the pretrial
03:56:57 4 order, your exhibit numbers must match what is on that
03:57:03 5 pretrial order, because that's what I use, and that's
03:57:05 6 what the Court uses to go by.

03:57:08 7 So at the end of each day whenever you're
03:57:10 8 giving me the paper exhibits, I need them in a separate
03:57:13 9 folder, like a manila folder that's been labeled Exhibit
03:57:17 10 A, B, C, D, whatever, running. Then I keep those.

03:57:20 11 And then the CDs, if it's been admitted that
03:57:24 12 day, that video evidence, then I need a CD that's been
03:57:27 13 marked with exhibit stickers. Make sure all your
03:57:30 14 exhibit stickers match your pretrial order list.

03:57:35 15 MS. EDWARDS: We have several stipulated
03:57:37 16 exhibits. So those would be joint exhibits.
03:57:38 17 Plaintiff's exhibits would be marked Plaintiff's
03:57:41 18 Exhibits, and defendant's exhibits would be marked
03:57:43 19 Defendant's Exhibits; does that sound appropriate? Or
03:57:44 20 do we need to redo the numbering?

03:57:46 21 THE CLERK: You still need to move to
03:57:46 22 introduce them so it's very clear on the record what
03:57:51 23 exhibits --

03:57:51 24 THE COURT: What is your question? Repeat
03:57:51 25 that question. You've got that third category.

03:57:54 1 MS. EDWARDS: Yes, and many of the exhibits
03:57:56 2 we agreed to. So we thought being a joint exhibit
03:58:02 3 would be most appropriate, then either of them could
03:58:05 4 introduce it.

03:58:06 5 THE COURT: So you would prefer, if I'm
03:58:08 6 following you, that there just be a number, not a
03:58:14 7 sourcing to the plaintiff or to the defendant on that
03:58:16 8 group of exhibits?

03:58:19 9 MS. EDWARDS: Yes.

03:58:19 10 MR. HARTZOG: Defer to the Court, but that
03:58:20 11 may make some sense. If it's a joint exhibit, it would
03:58:23 12 just be marked "Exhibit," then "Plaintiff's Exhibit,"
03:58:26 13 then "Defendant's Exhibit."

03:58:27 14 THE COURT: So you've got a sticker that
03:58:29 15 just says "Exhibit" for those, or you'll put a sticker
03:58:32 16 on. So when Sandra is doing the list of exhibits, she
03:58:38 17 typically has a column that says "Plaintiff," she has a
03:58:41 18 column "Defendant," so what Sandra will do now is add a
03:58:46 19 column that says "Joint."

03:58:49 20 MS. EDWARDS: That sounds good, Your Honor.

03:58:51 21 MR. HARTZOG: That's fine with us, Your
03:58:52 22 Honor.

03:58:52 23 THE COURT: Now let me tell you what happens
03:58:54 24 at the end of the trial. Because there's also a column
03:58:58 25 that says "Objection," "Sustained," "Overruled." We

03:59:04 1 sanitize that, and we use this non-argumentative exhibit
03:59:16 2 list of what's in as the index for the jury. Because
03:59:20 3 we send -- unless it's guns, money, drugs, weapons --
03:59:23 4 send everything back to the jury room. And I always
03:59:29 5 thought if they had an index, they can find what they
03:59:32 6 want.

03:59:33 7 So, for example, Number 1, Report of Autopsy
03:59:37 8 Examination. Is that going to say "Plaintiff,"
03:59:42 9 "Defendant," or is that just going to be a joint one?

03:59:45 10 MS. EDWARDS: I believe that particular
03:59:47 11 exhibit is joint.

03:59:48 12 MR. HARTZOG: I believe that was our first
03:59:50 13 joint exhibit.

03:59:50 14 THE COURT: Okay.

03:59:51 15 MR. HARTZOG: Can I ask a clarifying
03:59:53 16 question on the exhibit labeling? Probably both sides
03:59:56 17 at this point have had some exhibits that they've listed
03:59:59 18 in their pretrial that will not come into evidence or
04:00:03 19 will not be introduced. Do we want the numbering to
04:00:06 20 still match up to the pretrial even though they're
04:00:09 21 nonsequential at this point?

04:00:10 22 THE COURT: There's two different ways of
04:00:12 23 answering that question. If we go forward with today's
04:00:16 24 proposed pretrial order as controlling, the answer is
04:00:21 25 very definitely yes.

04:00:24 1 However, if you leave here and take on the
04:00:27 2 additional assignment of amending that pretrial order to
04:00:31 3 reflect decisions that have been made today, decisions
04:00:37 4 that were made by you before today, and decisions that
04:00:41 5 may be made by you in the coming weeks, it is fine with
04:00:47 6 me that you bring the next iteration of your pretrial
04:00:54 7 order the day we get together.

04:00:58 8 Sandra, is it okay with you?

04:01:01 9 THE CLERK: Yes, ma'am.

04:01:01 10 THE COURT: Then you can number anything
04:01:03 11 whatever you want to number it, just as long as it
04:01:06 12 matches that.

04:01:09 13 Do you want to take another stab at your
04:01:11 14 pretrial order?

04:01:15 15 MR. HARTZOG: Okay. We'll confer on that.

04:01:18 16 It makes sense to me, but we'll confer.

04:01:20 17 MS. EDWARDS: Sure.

04:01:21 18 MS. BEIGHTOL: As for the paper copy that
04:01:23 19 you want us to bring, do we need to bring multiple
04:01:26 20 copies for all the jurors or just one paper copy?

04:01:29 21 THE COURT: Well, you know, you're getting
04:01:33 22 into something that I haven't really focused on in this
04:01:35 23 trial is utility of juror notebooks. I have used them
04:01:44 24 in a few trials over 20 years, not very many. But if
04:01:51 25 it's something that both sides agree to -- sometimes it

04:01:55 1 may be, if there's a lot of shorthand nomenclature, to
04:02:00 2 do a shared index that explains a little bit about
04:02:04 3 certain documents that will be coming in. There are all
04:02:09 4 different ways to look at it.

04:02:11 5 The answer to your question is: No, I just
04:02:16 6 need one. But if you all think there are some key
04:02:19 7 documents that each juror should have a copy of while a
04:02:23 8 witness is testifying -- of course, we don't want to
04:02:27 9 distract from the witness's testimony. Because I'm
04:02:29 10 going to tell the jury at the start: You're going to
04:02:32 11 have a copy of each exhibit admitted, and you're going
04:02:37 12 to have any audio/visual in whatever format, and you'll
04:02:44 13 be able to play it, but one thing you're not going to
04:02:47 14 have is trial testimony. I'm going to tell them that
04:02:52 15 we just don't do it. We don't have a system in place
04:02:57 16 whereby I can send them certified transcripts. I'm
04:03:04 17 going to just emphasize that if you don't hear what a
04:03:07 18 witness says or a question that's being asked, raise
04:03:10 19 your hand, and we'll address it right then and there,
04:03:14 20 because I will not be in a position to send you back
04:03:18 21 trial testimony.

04:03:20 22 So I'll just leave you with those thoughts.
04:03:24 23 If there are some exhibits that you want everybody to
04:03:27 24 have, and there's no disagreement, you can come to court
04:03:30 25 with ten notebooks. And I tell them to put them under

04:03:36 1 their chair. And when it's necessary for you to look at
04:03:39 2 the notebook, jurors, I will let you know. And
04:03:45 3 sometimes there's something that might have to get
04:03:47 4 passed around. I don't know that there is in this
04:03:50 5 case. Sometimes I put stuff on a table and let them
04:03:55 6 walk around it; that's possible.

04:03:57 7 But is there anything that comes to your
04:04:00 8 mind that we would want to do this?

04:04:02 9 MR. HARTZOG: Possibly the knife that was
04:04:04 10 recovered at the scene. We're trying to coordinate
04:04:07 11 whether to have that in person or pictures. But there
04:04:09 12 is a possibility that the knife itself would be shown to
04:04:14 13 the jury.

04:04:14 14 THE COURT: Well, what we do is we roll that
04:04:16 15 table that's over there in the corner, which is where
04:04:20 16 somebody's suitcase is going to be gone by the time we
04:04:23 17 start, but the clerk will use that sort of for exhibits.
04:04:29 18 But we'll clear it off, and we can roll it into the
04:04:32 19 middle of the courtroom, and we let everybody walk
04:04:35 20 around. I don't think we'd want to put a knife in each
04:04:38 21 person's hand. But if that's something you wanted to
04:04:41 22 do, and that suited both sides particularly, that's fine
04:04:44 23 with me. We just need to kind of stage that.

04:04:49 24 MR. HARTZOG: Understood.

04:04:51 25 MS. EDWARDS: Your Honor, can I, since we're

04:04:53 1 in the question asking stage, can I ask you a couple
04:04:56 2 other questions?

04:04:57 3 One is: During opening we were told this
04:05:00 4 morning it would be from the well and behind a podium.

04:05:06 5 THE COURT: If you want it.

04:05:07 6 MS. EDWARDS: Okay. Because he did -- I was
04:05:09 7 wondering, do we need to be behind the podium or not?

04:05:14 8 THE COURT: These are good questions to ask.

04:05:18 9 Do you want to be behind a podium when you give your
04:05:21 10 opening statement?

04:05:22 11 MR. HARTZOG: I typically would, because I
04:05:24 12 probably have a notebook of things. But I could also
04:05:28 13 go without if needed.

04:05:30 14 THE COURT: It's fine. And if you don't
04:05:32 15 want to be behind the podium, what we will do is you'll
04:05:37 16 be lapel mic'ed up, and Sandra will turn off the
04:05:43 17 microphone to the podium, because we don't want the
04:05:45 18 feedback. And you can walk around however you like.

04:05:50 19 MS. EDWARDS: That might be a question for
04:05:52 20 another day, but we just kind of wanted to figure out
04:05:54 21 what the parameters were.

04:05:56 22 And similarly, is an old-school flip
04:06:01 23 chart -- are we allowed to have that?

04:06:03 24 THE COURT: Sure.

04:06:03 25 MS. EDWARDS: I know it's not technology.

04:06:06 1 THE COURT: Are you going to want to show
04:06:07 2 any evidence? Because that really kind of raises for me
04:06:10 3 some concerns, unless there's no issue between the
04:06:15 4 sides.

04:06:16 5 MR. HARTZOG: That was my next question
04:06:18 6 about: Can we show joint exhibits or other exhibits
04:06:23 7 during our opening?

04:06:24 8 THE COURT: Joint exhibits or other
04:06:27 9 exhibits. Let's deal first with joint exhibits.
04:06:30 10 Would there be a joint exhibit you would like to show?

04:06:33 11 MS. EDWARDS: I think we would prefer not to
04:06:35 12 show any exhibits during opening.

04:06:37 13 MR. HARTZOG: I'm fine.

04:06:39 14 THE COURT: Given that answer, I'm going to
04:06:41 15 say unless it's really compelling, let's not get into
04:06:45 16 exhibits in opening.

04:06:46 17 MR. HARTZOG: That's fair.

04:06:47 18 THE COURT: I'll make the point that this is
04:06:50 19 opening statement; It's what the lawyer thinks the
04:06:53 20 evidence will show and aspects of it that you're asked
04:06:58 21 to pay careful attention to, And just kind of leave it
04:07:01 22 at that.

04:07:06 23 Now, flip charts, is this a chart that's
04:07:08 24 going to come in as a demonstrative? You just want to
04:07:13 25 write stuff down as you go and kind of teach a little

04:07:17 1 bit?

04:07:17 2 MS. EDWARDS: Yes, Your Honor.

04:07:17 3 THE COURT: State a little bit?

04:07:19 4 Are you okay with that?

04:07:20 5 MR. HARTZOG: It depends what she writes,

04:07:24 6 Your Honor.

04:07:25 7 THE COURT: I can appreciate that. You

04:07:28 8 don't have to sit right there. You can, if you want

04:07:31 9 during her opening statement, go over and sit in the

04:07:34 10 first row. And the same -- but I'm assuming that you're

04:07:45 11 just going to be drawing a timeline or --

04:07:49 12 MS. EDWARDS: I'm not entirely sure at this

04:07:53 13 point. We haven't planned it. But I think just to

04:07:58 14 highlight some essential elements.

04:08:00 15 THE COURT: We haven't used the easel in a

04:08:02 16 long time.

04:08:03 17 Sandra, do you know where the easel is?

04:08:07 18 THE CLERK: I will have to dig.

04:08:09 19 MS. EDWARDS: We can bring our own easel, if

04:08:12 20 that would be helpful.

04:08:13 21 THE COURT: Likewise, if you want a chart,

04:08:16 22 you can.

04:08:17 23 And we typically give the plaintiff the

04:08:24 24 nicer conference room. Have you seen that?

04:08:27 25 MS. EDWARDS: We have not, Your Honor.

04:08:30 1 THE COURT: It's just the way it typically
04:08:33 2 falls.

04:08:33 3 MR. HARTZOG: Defense counsel always gets
04:08:37 4 the short end of the stick.

04:08:39 5 THE COURT: But we've got a room for you.

04:08:41 6 MR. HARTZOG: We're perfectly happy in a
04:08:43 7 small room.

04:08:44 8 THE COURT: And there's a wall between you.
04:08:45 9 So you just need to think about that. But we want you
04:08:48 10 to be comfortable.

04:08:50 11 Sandra, can you show them those rooms before
04:08:52 12 they leave? It's just not like we've got a lot of
04:08:55 13 choice. The plaintiff's room is the old Marshal's
04:08:58 14 office in the building. And yours is probably where
04:09:02 15 they used to keep the HVAC system.

04:09:06 16 MR. HARTZOG: It will be totally fine, Your
04:09:08 17 Honor. Thank you.

04:09:10 18 THE COURT: What else to talk about? I
04:09:15 19 know we haven't talked about some things that I wish we
04:09:17 20 could have gotten to, but we're heading into the 4:00
04:09:21 21 hour. I can answer a few more questions. Is there
04:09:24 22 anything else from the defense side that I need to rule
04:09:27 23 on, focus on right now to help you?

04:09:31 24 MR. HARTZOG: I did have an issue with some
04:09:32 25 of the jury instructions, but I assume we'll get to that

04:09:35 1 at a later date.

04:09:37 2 THE COURT: Yes. I think we've bitten off
04:09:40 3 right much, particularly if you all decide to revise the
04:09:43 4 pretrial order. I'm not going to order you to do it.
04:09:47 5 But there are benefits to you doing that, I would just
04:09:50 6 point out, that accrue to both sides.

04:09:53 7 So we're starting at, I told you, 9:00 a.m.
04:10:00 8 I think you all ought to talk to me once on the phone
04:10:04 9 before trial. I'd like to know what's your decision on
04:10:08 10 notebooks? Are you wanting to use those? There may be
04:10:14 11 some other things to talk about. Even if it's just ten
04:10:18 12 minutes, I think we ought to do it over the phone and
04:10:21 13 just touch base.

04:10:24 14 And I'll just leave it up to you all to talk
04:10:26 15 to Sandra about my schedule as she understands it. You
04:10:31 16 don't need to do it today, but give me a couple choices
04:10:35 17 in the weeks to come. And maybe I can answer some
04:10:42 18 questions then.

04:10:43 19 MS. BEIGHTOL: I have one other, just,
04:10:44 20 question. We've talked about playing video testimony.
04:10:48 21 In the event that either party chooses to play video
04:10:51 22 testimony, do we just bring a DVD with the agreed
04:10:57 23 sections of that testimony that morning and just play it
04:11:01 24 through here, or is there any protocol that you
04:11:03 25 appreciate with regard to --

04:11:05 1 THE COURT: Well, you're kind of returning
04:11:07 2 us to something that we talked about earlier in my mind,
04:11:11 3 and it's important. I said: Are there any issues as
04:11:15 4 to videotaped depositions? And then we talked about
04:11:19 5 how that might sort itself out as we go along. Did
04:11:23 6 that, ladies and gentlemen, today sort itself out, or do
04:11:29 7 we still have some issues?

04:11:31 8 MR. HARTZOG: There may still be a couple
04:11:33 9 issues that need to be addressed in that regard. And
04:11:39 10 we can do that now or over the phone or whatever Your
04:11:44 11 Honor prefers.

04:11:44 12 THE COURT: Do I need to watch the videos to
04:11:46 13 take up these issues?

04:11:48 14 MR. HARTZOG: I don't believe so, Your
04:11:50 15 Honor, at least as to some of them. For example, we've
04:11:53 16 objected to testimony about Officer Edwards's use of
04:11:58 17 medication, and that's the subject of a separate motion
04:12:03 18 in limine that would resolve that issue.

04:12:05 19 THE COURT: Haven't I already addressed
04:12:07 20 that?

04:12:07 21 MR. HARTZOG: I think Your Honor's decision
04:12:09 22 was that their expert could testify as to the effect of
04:12:14 23 Adderall. But I think some of the deposition testimony
04:12:21 24 was asking him why he uses it and that type of stuff.

04:12:42 25 THE COURT: Is that something plaintiff

04:12:45 1 still wants to explore in trial testimony?

04:12:47 2 MS. BEIGHTOL: As far as Defendant Edwards, I
04:12:50 3 think what the plaintiff would propose is sort of like
04:12:52 4 what Your Honor talked about being the story, the story
04:12:56 5 of the day, that he woke up, that he took these
04:12:58 6 medications, what they were for. There were other
04:13:01 7 medications, including heart medications and other
04:13:05 8 things taken in the time period leading up to. So the
04:13:08 9 focus won't be on that specific one, but just in the
04:13:12 10 context of the day and what happened.

04:13:15 11 The plaintiff, Your Honor, has full
04:13:19 12 knowledge of your ruling on their expert and would not
04:13:22 13 intend to offer any expert testimony outside of what the
04:13:26 14 Court permitted at this time. So that, we are not
04:13:36 15 concerned about. We plan to follow your order on Dr.
04:13:39 16 Tackett as well as Dr. Alpert.

04:13:45 17 THE COURT: I'm reminded I deferred ruling
04:13:47 18 on whether Tackett could testify as to whether
04:13:50 19 defendant's conduct was consistent with that of an
04:13:53 20 individual whose perception had been altered by Adderall
04:14:00 21 as distinguished from whether Adderall did, in fact,
04:14:04 22 influence his perception.

04:14:06 23 MS. BEIGHTOL: Your Honor, this is obviously
04:14:08 24 in your discretion, but my thought with regard to that
04:14:11 25 is that we take that up in the event the plaintiff

04:14:13 1 intends to offer that testimony closer to the time of
04:14:17 2 that piece of testimony. I think talking about it
04:14:21 3 right now might be a bit premature, and also don't want
04:14:25 4 to waste the Court's time on something that may or may
04:14:27 5 not be necessary at this time.

04:14:28 6 THE COURT: Can you let me know if that is
04:14:30 7 an issue before you get into it, as Defendant has made
04:14:34 8 this motion?

04:14:36 9 MS. BEIGHTOL: Absolutely.

04:14:37 10 And the parties did agree, if it helps Your
04:14:40 11 Honor, on a couple of motions during the break, if it's
04:14:42 12 okay for the parties to let you know that. One of
04:14:45 13 which was related to hearsay testimony, which was a
04:14:48 14 motion.

04:14:49 15 MR. HARTZOG: I think probably the most
04:14:51 16 appropriate way to handle that, since we were just sort
04:14:53 17 of talking off the cuff, I would like to review. But
04:14:56 18 when we do an amended pretrial order, we could do
04:14:59 19 that --

04:14:59 20 MS. BEIGHTOL: That's perfectly fine. I
04:15:00 21 was just trying to save you some time.

04:15:02 22 THE COURT: I'm going to like an amended
04:15:08 23 pretrial order. I think that's a good use.

04:15:11 24 And who knows, in talking it through you may
04:15:13 25 agree on some other things.

04:15:17 1 Okay. So the question is: Can I elicit
04:15:23 2 testimony from plaintiff's perspective about what that
04:15:28 3 day was like, which includes what drugs your client
04:15:32 4 ingested.

04:15:35 5 MR. HARTZOG: And that's the basis of our
04:15:37 6 motion. I don't think what medication he takes is
04:15:39 7 relevant to whether he used excessive force.

04:15:51 8 THE COURT: Let me think about that one.

04:15:55 9 Okay?

04:15:56 10 Because that's something you want to do?

04:15:58 11 MS. BEIGHTOL: Absolutely. It's the context
04:16:00 12 of the day. It's like how much sleep he had the night
04:16:05 13 before. Those questions are all in order.

04:16:07 14 I can credit my co-counsel with taking a
04:16:10 15 very methodical deposition of the steps of the day.
04:16:14 16 It's not focused on what drugs he took. But it is very
04:16:17 17 methodical: When did you wake up? What time did you go
04:16:22 18 to sleep the night before? Did you take anything before
04:16:24 19 you went to sleep? Did you take anything when you woke
04:16:27 20 up?

04:16:27 21 Also, Your Honor has ruled that Dr. Tackett
04:16:29 22 can come to trial and talk about Adderall and its effect
04:16:36 23 in general. So excluding that testimony would sort of
04:16:37 24 end run that whole issue, which I think would go against
04:16:40 25 the prior ruling permitting him.

04:16:43 1 And again, if we're going to go into the
04:16:45 2 third category that you suggested that would cause
04:16:47 3 another ruling, we would let you know well in advance.
04:16:50 4 But at this point our intent is just to offer the facts
04:16:53 5 of the day. And that is part of the facts, just like
04:16:57 6 the body-worn camera was not turned on. It's part of
04:17:01 7 the facts like what he drove there and what uniform he
04:17:04 8 wore, which are all discussed in that same category of
04:17:08 9 testimony. What did he have on his belt? Could he
04:17:10 10 see? What was the lighting? Those are all pieces of
04:17:13 11 fact that go to his perception, that go to what he knew
04:17:16 12 and what he didn't know, and all of those things.

04:17:18 13 THE COURT: And I'm mindful of the fact that
04:17:20 14 the defendant has asked the Court to reconsider that
04:17:25 15 part of its December 1st order that Tackett is qualified
04:17:32 16 to opine on the effect of Adderall generally and has
04:17:38 17 applied a reliable or accepted methodology. So he's
04:17:42 18 raised that up as an issue, whether Tackett can actually
04:17:46 19 testify.

04:17:48 20 Do you have anything that's new on that
04:17:52 21 question?

04:17:53 22 MR. HARTZOG: Nothing new, Your Honor.
04:17:54 23 It's the same issue that's been briefed.

04:17:56 24 THE COURT: Well, that part of your motion
04:17:57 25 is denied.

04:18:02 1 So, I mean, the point you make is well
04:18:06 2 taken. So, yes, you can ask him. I'm going to go
04:18:12 3 ahead and make that ruling now. You can ask him what
04:18:15 4 medicine he took that morning.

04:18:17 5 MS. BEIGHTOL: Thank you, Your Honor.

04:18:18 6 THE COURT: Anything else to talk about now?

04:18:26 7 MR. HARTZOG: I feel like we've got a lot to
04:18:27 8 talk about, but nothing I can think of that is urgent
04:18:30 9 for today, Your Honor. I think a lot of these rulings
04:18:39 10 can be made as the evidence comes up.

04:18:52 11 THE COURT: Contributory negligence. Let's
04:19:01 12 revisit past dealings with law enforcement. It's been
04:19:07 13 a long day. Remind me how far we got on that.

04:19:13 14 MR. HARTZOG: I think, if I recall
04:19:16 15 correctly, Your Honor had said that we were not supposed
04:19:21 16 to bring up past incidences of him having issues with
04:19:25 17 law enforcement unless it was -- unless it came up and
04:19:30 18 it was impeachment for something.

04:19:32 19 THE COURT: Well, are you thinking that I
04:19:36 20 need to think more about that defense?

04:19:41 21 MR. HARTZOG: Perhaps, Your Honor, because I
04:19:43 22 do think -- and forgive me; I forgot that contributory
04:19:48 23 negligence was an issue in this case because it's so
04:19:51 24 focused on the 1983 claim.

04:19:53 25 THE COURT: Is it on the verdict form?

04:19:55 1 MR. HARTZOG: It is, Your Honor, because
04:19:57 2 they do have a negligence claim. So I do think the
04:20:00 3 contributory negligence -- I think that only amplifies
04:20:03 4 the reason why these prior issues should come into
04:20:07 5 evidence.

04:20:13 6 THE COURT: Because you're, for example,
04:20:18 7 saying that he assaulted a police officer in 2018 and
04:20:22 8 received a broken shoulder.

04:20:25 9 MR. HARTZOG: I think it sort of goes to him
04:20:27 10 understanding the risk of being violent in a law
04:20:32 11 enforcement encounter.

04:20:32 12 THE COURT: But, of course, that would need,
04:20:34 13 if I let that in for that purpose, a careful limiting
04:20:37 14 instruction to the jury.

04:20:39 15 MR. HARTZOG: Understood.

04:20:41 16 THE COURT: And I think you ought to be
04:20:44 17 thinking about that.

04:20:46 18 MR. HARTZOG: Okay.

04:20:46 19 THE COURT: As far as limiting instructions,
04:20:48 20 while I'm saying you can bring the amended pretrial
04:20:51 21 order that day and the formatted evidence that day, I'd
04:20:58 22 like a week before the trial if you're in a position to
04:21:04 23 send me then any limiting instructions that you know of.
04:21:08 24 And, of course, things can come up during trial. You
04:21:12 25 could make an oral motion for a limiting instruction.

04:21:14 1 Just because you didn't file one doesn't mean you can't
04:21:18 2 make one. But if you know by the week before the trial
04:21:21 3 that there's some you really, really want, or five days
04:21:25 4 before the trial, send them to me so I can be looking at
04:21:28 5 them. And send me the sources. Make sure to include
04:21:32 6 the sources of them to the best of your ability. Okay?

04:21:38 7 MS. BEIGHTOL: Your Honor, because defendant
04:21:40 8 did not raise contrib, and the Court did, we would like
04:21:45 9 permission to brief that issue.

04:21:46 10 THE COURT: Well, the defendant's got it on
04:21:49 11 its verdict form.

04:21:50 12 MS. BEIGHTOL: Right. But in the context
04:21:52 13 of the motion that the plaintiffs made, we never got a
04:21:56 14 response brief to our motions in limine. And we would
04:21:59 15 like the opportunity, because that wasn't a specific
04:22:03 16 issue that's been raised to us, that we could brief that
04:22:07 17 before Your Honor.

04:22:10 18 THE COURT: What would you like to say in
04:22:11 19 your brief?

04:22:12 20 MS. BEIGHTOL: I think we'd like to talk
04:22:13 21 about specifically how this has been handled in other
04:22:16 22 courts and also the danger of unfair prejudice as it
04:22:19 23 relates to the excessive force issue which, of course,
04:22:21 24 we have briefed, but as it relates specifically to the
04:22:24 25 contributory negligence.

04:22:26 1 THE COURT: It's a big issue, isn't it?

04:22:28 2 MS. BEIGHTOL: I think we'd like to look at

04:22:29 3 the law and provide that to the Court to assist Your

04:22:32 4 Honor with that determination.

04:22:34 5 THE COURT: So you would be making a motion?

04:22:37 6 Remind me. Did this one slide through the cracks a

04:22:42 7 little bit?

04:22:43 8 MS. BEIGHTOL: I don't think this slid

04:22:44 9 through the cracks. I think Defendant's Edwards's

04:22:48 10 counsel just shared that he had forgotten that was one

04:22:51 11 of the issues.

04:22:52 12 MR. HARTZOG: It's addressed in our trial

04:22:52 13 briefs.

04:22:53 14 MS. BEIGHTOL: We did not get a response

04:22:55 15 brief on our motions in limine. Had that been raised,

04:22:57 16 we would have briefed it and been prepared to present

04:22:58 17 that --

04:22:58 18 THE COURT: Did you make a motion in limine

04:23:00 19 directed to the contributory negligence?

04:23:02 20 MS. BEIGHTOL: We made a motion in limine to

04:23:04 21 keep out the past dealings with law enforcement. So

04:23:07 22 that was our motion in limine.

04:23:10 23 THE COURT: Okay.

04:23:10 24 MR. HARTZOG: Your Honor, just to clarify,

04:23:12 25 when I said I forgot contributory, I meant earlier

04:23:16 1 today. We have raised it in our jury instructions, in
04:23:19 2 our verdict form, and in our trial brief.

04:23:21 3 THE COURT: Right. I'm looking at your
04:23:23 4 verdict form. "Did the decedent by his own negligence
04:23:26 5 contribute to his injuries?" "Did Officer Edwards have
04:23:34 6 the last clear chance to avoid?"

04:23:43 7 MS. BEIGHTOL: And if he's seeking to enter
04:23:45 8 it, I mean, we did brief the prior bad acts issue and
04:23:47 9 the other issues as it relates to it shouldn't be
04:23:51 10 entered to be in conformity therewith.

04:23:53 11 THE COURT: I am not telling you you can't
04:23:55 12 right now try to challenge contributory negligence being
04:23:59 13 part of this case. I'm saying we all benefit from
04:24:02 14 focusing on this now and putting the Court in the
04:24:06 15 position with benefit of briefing. And so what you're
04:24:10 16 talking to me about is now making a motion specific to
04:24:15 17 this issue. And when can you file it with your brief?
04:24:21 18 How quickly can you do that?

04:24:22 19 MS. EDWARDS: Your Honor, just for
04:24:24 20 clarification, correct me if I'm wrong, but Ms. Beightol
04:24:30 21 wasn't asking to brief the issue of whether contrib
04:24:33 22 should be considered at all, but it wasn't raised as a
04:24:37 23 reason for an opposition to the motion in limine number
04:24:40 24 3 that plaintiff has already made regarding prior
04:24:43 25 dealings with law enforcement. But the Court just

04:24:46 1 introduced that concept. So we wanted a chance to
04:24:49 2 brief that.

04:24:52 3 THE COURT: However you want to do it. But
04:24:54 4 he's going to get a chance to respond, I think.

04:24:58 5 MS. BEIGHTOL: That's fair. And he had not
04:25:01 6 responded to our motion in limine, which is why we
04:25:03 7 wanted the extra briefing. We're fine to have a
04:25:05 8 discourse in briefing. We just thought it would be --

04:25:08 9 THE COURT: Do you want to call it
04:25:10 10 supplemental?

04:25:10 11 MS. BEIGHTOL: Exactly.

04:25:11 12 I'm sorry I did not articulate that
04:25:14 13 accurately. But she did articulate what I was trying
04:25:17 14 to communicate.

04:25:18 15 THE COURT: A good partnership.

04:25:19 16 How soon can you file your supplemental
04:25:22 17 brief?

04:25:23 18 MS. BEIGHTOL: End of the week?

04:25:28 19 THE COURT: And then you're wanting to file
04:25:29 20 or needing to file a response to that.

04:25:32 21 MR. HARTZOG: Within a week, a week of their
04:25:34 22 filing? Would that be sufficient?

04:25:40 23 MS. EDWARDS: We may be able to get it filed
04:25:43 24 sooner. We'll file it as soon as it's ready.

04:25:46 25 THE COURT: You have five days to respond

04:25:50 1 whenever they file it. If it falls on the weekend, you
04:25:53 2 can carry it over to Monday. The same for you.

04:25:58 3 Anything else? All right. So madam
04:26:05 4 clerk, would you like my law clerk to run upstairs and
04:26:08 5 get the keys? You've got them right there. So she's
04:26:13 6 going to show you what these rooms look like. And you
04:26:16 7 can also open the door and give them a peek into the
04:26:19 8 jury room, and show them -- this will be the first trial
04:26:24 9 since COVID started, not the first one, but the first
04:26:28 10 one that we're doing in the pre-COVID ways. We're
04:26:31 11 actually using the jury room versus the bankruptcy
04:26:34 12 hearing room. We're actually seating everyone together.
04:26:37 13 We're actually going to pass the microphone that I put
04:26:41 14 in the hands of each person, and they answer a
04:26:46 15 preprinted set of questions. Then they pass the
04:26:50 16 microphone. And it goes around. So if those who help
04:26:54 17 me stutter a little bit, it's because we're relearning
04:26:59 18 some of the pathways that we used to use two and a half,
04:27:04 19 three years ago. And I'm excited about it.

04:27:10 20 And so you know that you each get three
04:27:14 21 strikes. And so I'm going to be qualifying 16 people
04:27:19 22 to get to that ten. Do you all have any questions
04:27:22 23 about that process? And you're going to exercise your
04:27:25 24 strikes one, one, one, one, one. And the last ten
04:27:31 25 people are the -- now, if you don't exercise all your

04:27:36 1 strikes, it's the first ten people.

04:27:39 2 MS. EDWARDS: I had a question about if you
04:27:41 3 don't exercise all your strikes, how do we know who the
04:27:45 4 first ten people are? Is that evident?

04:27:48 5 THE COURT: You will be given a list after
04:27:50 6 check-in, so we know exactly who's come in. And we'll
04:27:53 7 have our extra people for challenges, for cause.

04:28:04 8 Sandra, has there been some discussion
04:28:06 9 between you and the jury coordinator how many people I
04:28:10 10 wanted to come in?

04:28:11 11 THE CLERK: Not at this time.

04:28:19 12 THE COURT: Given the nature of the case,
04:28:21 13 let's have 38 people. That's going to be more than
04:28:25 14 enough, don't you think, to pick the jury?

04:28:25 15 MS. EDWARDS: Yes, Your Honor.

04:28:33 16 THE COURT: So, yes, you will have a sheet of
04:28:35 17 paper in your hands. When it comes time for selection,
04:28:39 18 the clerk has made a chart, and it will have 16 people
04:28:42 19 in the order on the chart. And we will give you the
04:28:49 20 official chart at time of selection after I've heard and
04:28:53 21 decided any challenges. And we will give it first to
04:28:56 22 plaintiff, and you will strike one. And it doesn't come
04:29:00 23 back to me; it goes right over there. You will strike
04:29:02 24 one. You will strike one.

04:29:04 25 And say it comes back to you, and you don't

04:29:07 1 strike anybody; you give it to them. You're deemed to
04:29:13 2 have approved everybody who's left.

04:29:15 3 And likewise, if on pass you don't exercise
04:29:19 4 a strike, you're deemed to have approved everybody left.

04:29:25 5 And sometimes I get this question: Say I've
04:29:28 6 got the 16 people up here, and I strike somebody, say,
04:29:34 7 for cause. And the person I strike for cause is seated
04:29:38 8 in the first box; they were the first person called.
04:29:41 9 And so then I bring up the 17th person who's out there
04:29:45 10 in the audience, and they slide by all those people, and
04:29:50 11 they take that first seat. At that point I deem them
04:29:54 12 number one. I let that control. So don't think that
04:30:01 13 they're going to be the last person on your list.
04:30:03 14 They're going to be the first person. Are you with me?
04:30:07 15 MR. HARTZOG: The chair, not the person,
04:30:09 16 essentially?
04:30:09 17 THE COURT: Yes. That's pretty much it.
04:30:18 18 I'm trying to think of a competing scenario, but one
04:30:22 19 doesn't come to mind. But at that point it's just a
04:30:27 20 whole lot easier to keep track of that. That person
04:30:32 21 comes back to number one.
04:30:34 22 MS. EDWARDS: Your Honor, I believe you said
04:30:35 23 this before, but there are no alternates?
04:30:38 24 THE COURT: No. So if we lose somebody, say
04:30:40 25 we lose somebody to COVID, we go down to nine. Now, if

04:30:44 1 you feel strongly that I need to start with more, Judge
04:30:47 2 Britt would always try a civil case with 12 people, and
04:30:52 3 I have always tried with ten. As long as we have six,
04:30:58 4 that's enough. So there aren't alternates in civil
04:31:00 5 cases.

04:31:01 6 Do you feel that ten is enough?

04:31:03 7 MS. EDWARDS: Yes, Your Honor.

04:31:06 8 MR. HARTZOG: Yes, Your Honor.

04:31:08 9 THE COURT: But it could go down to nine; it
04:31:10 10 could go down to eight. We've had very good luck with
04:31:13 11 not losing people. I think we've lost one person to
04:31:17 12 COVID over the whole time. And I was trying case after
04:31:21 13 case after case. So hopefully we'll be as fortunate.

04:31:27 14 Now, if we end up at a point where, say,
04:31:31 15 there are 11 people left, and somebody didn't exercise a
04:31:35 16 strike. I might look at you and say: Do you want all
04:31:38 17 11? But you both have to agree to that. Otherwise --
04:31:43 18 and we'd all have to know that some storm was coming,
04:31:47 19 some inclement whether. But otherwise I keep to ten.

04:31:53 20 I'm tired of hearing myself speak. Are
04:31:57 21 there any other questions that if answered now might be
04:32:00 22 helpful to you?

04:32:06 23 MS. EDWARDS: No, Your Honor.

04:32:07 24 MR. HARTZOG: Thank you, Your Honor.

04:32:08 25 THE COURT: Good luck to both sides in your

04:32:09 1 continued preparation. Ms. Collins will be looking
04:32:11 2 over the next couple days for you to call. Give me a
04:32:15 3 couple dates and times for a telephonic conference. If
04:32:17 4 there are questions that have come up between now and
04:32:20 5 then, I can answer them.

04:32:21 6 Otherwise, I'll be on the lookout for your
04:32:23 7 briefing and your response. And I appreciate the
04:32:32 8 opportunity to consider that more deeply. Thank you.

9 (Concluded at 3:42 p.m.)

10 - - -
11

12 C E R T I F I C A T E

13
14 I certify that the foregoing is a correct transcript
15 from the record of proceedings in the above-entitled
16 matter.

17
18 /s/ Tracy L. McGurk _____
19 Tracy L. McGurk, RMR, CRR

20 _____ 2/20/2023 _____
21 Date
22
23
24
25

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